Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-19

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

DOMINGA SANTANA and WILLIAM ALEJANDRO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT H. BORK,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

FRANK H. EASTERBROOK,
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Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DOMINGA SANTANA and WILLIAM ALEJANDRO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The court of appeals rendered no opinion. The oral opinion of the district court (App. A, *infra*, pp. 1a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 7a) was entered on March 21, 1975, and

the government's timely petition for rehearing and suggestion of rehearing *en banc* was denied on May 8, 1975 (App. C, *infra*, p. 8a). On May 30, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including July 7, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an arrest warrant is required in order to make an arrest, on probable cause, of a person standing in plain view in the doorway of her residence.

2. If not, whether the police may effect a warrantless arrest if the suspect retreats into her residence after the police advise her of their authority and purpose.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On August 16, 1974, Michael Gilletti, an undercover officer with the Philadelphia Narcotics Squad,

told Patricia McCafferty (from whom he had purchased narcotics before) that he wanted to purchase a "bundle" of heroin (Tr. 11-12, 22-23).[1] McCafferty, not knowing that Gilletti was a law enforcement officer, agreed; she told Gilletti that the bundle would cost "$115 and we will go down to Mom Santana's for the dope" (Tr. 12).

Gilletti, who intended to arrest McCafferty if she sold him the drugs, informed his immediate supervisor of the proposed transaction, arranged for surveillance, and recorded the serial numbers on the bills to be used (Tr. 13, 29-30). After he met McCafferty, she directed him to drive to Fifth and Dauphin Streets. Upon arrival, Gilletti gave her $110. McCafferty approached the residence at 2311 North Fifth Street. She had a brief discussion with respondent Alejandro, who was sitting on the steps, then she entered the row house. Approximately five minutes later, McCafferty returned to Gilletti's car. Gilletti drove about a block and a half; he stopped and McCafferty produced the heroin. Gilletti gave a pre-arranged signal to the surveillance officers and arrested McCafferty (Tr. 13-15, 67, 86). After being given *Miranda* warnings, McCafferty told Gilletti that "Mom Santana has the money" (Tr. 15).

Three of the surveillance officers immediately returned to the row house at 2311 North Fifth Street. As they drew up in front of respondent Santana's

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[1] "Tr." refers to the transcript of the suppression hearing on November 12 and 13, 1974.

residence, they saw her[2] standing in the doorway with a brown paper bag in her hand. The officers testified that they got out of the car with their guns drawn and their identification cards and badges displayed, and that they announced "Police" (Tr. 68, 74-75, 80, 84, 102).[3] Santana retreated into the vestibule and was followed by the officers. One of the officers caught Santana's hand as she attempted to leave the vestibule for one of the interior rooms. A struggle ensued during which two "glazed paper packets [containing] a white powder fell to the floor" (Tr. 68). Respondent Alejandro picked up the packets and attempted to flee, but he was subdued by another officer (Tr. 68, 80, 102-103).

Following the brief scuffle, respondents were searched. The bag that Santana was holding contained "15 bundles of white powder in glazed paper packets" (Tr. 69). Santana had $135 on her person, $70 of which was identified as money that Gilletti had given to McCafferty for the heroin and that McCafferty claimed to have given to Santana (Tr. 81-82, 90-91).

2. An indictment filed in the United States District Court for the Eastern District of Pennsylvania

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[2] Officer Strohm testified that he recognized Santana, whom he had seen before (Tr. 74).

[3] Santana's daughter and daughter-in-law testified that the officers did not identify themselves as police and that it appeared to be a robbery, although neither attempted to call the police (Tr. 108, 112-114, 116-118). The district court did not resolve this conflict.

charged McCafferty with distribution of heroin, in violation of 21 U.S.C. 841, and Santana and Alejandro with possession of heroin with intent to distribute, in violation of the same section. McCafferty pleaded guilty. Santana and Alejandro moved to suppress the heroin and money found during and after their arrests.

The district court read its opinion from the bench on November 13, 1974 (App. A, *infra*). The court concluded that "[t]here was strong probable cause [to believe] that [respondent] Santana had participated in the transaction with Defendant McCafferty" (App. A, *infra*, p. 3a). The court nevertheless suppressed the evidence. The court apparently concluded that the arrest was unconstitutional because made without a warrant; after recounting that an officer had testified that he went to the house to arrest respondent Santana, the court stated that this would "require a warrant, * * * a warrant of arrest under ordinary circumstances * * *" (*ibid*). The court also concluded that "[t]here is no evidence that either [respondent] was armed which is an important consideration in considering whether or not a warrantless arrest or search can be undertaken" (*ibid.*), and that because the money was found in respondent Santana's pocket, there "was no basis to conclude that it was to be destroyed" (*id.* at 4a).

The district court then rejected the government's argument that Santana's arrest could be considered part of the "hot pursuit" immediately after a crime:

the court restricted this justification to "a usual kind of a chase in and about public streets or places or even in and about a building" (*id.* at 4a-5a). Because there was no "chase" in this case, the district court declined to uphold the arrest.

The United States appealed. The court of appeals affirmed without opinion (App. B, *infra*, p. 7a).

REASONS FOR GRANTING THE WRIT

The district court held that the arrest was defective because made without a warrant. If Santana was unlawfully arrested, the items seized incident to her arrest are inadmissible in a prosecution against her.[4] We do not know the reasons for the Third Circuit's summary affirmance, but we can perceive only two possible grounds. On one hand, the court of appeals might have concluded that all arrests require warrants in the absence of circumstances more "exigent" than "the extreme emergency posture of a case like this" (App. A, *infra*, p. 5a). On the other, the court might have believed that, although probable cause usually is sufficient to support a felony arrest, a warrant was required here because the arrest ultimately took place in the vestibule of respondent Santana's home. Both of these alterna-

[4] It is unclear what grounds, if any, provide respondent Alejandro with standing to challenge the seizure of the heroin and money. However, the government did not contend below that Alejandro lacks standing, and, accordingly, we have not presented it as a question for resolution by this Court.

tive grounds present important issues concerning the proper administration of criminal justice.

1. If the court's affirmance rested upon the proposition that warrants ordinarily are required to support a felony arrest on probable cause, this case presents an issue similar to that now before the Court in *United States* v. *Watson*, certiorari granted, 420 U.S. 924.[5] We have argued in *Watson* that probable cause is constitutionally sufficient to support a felony arrest in a public place, and that a warrant is not required even if there is time to obtain one. See also *Carroll* v. *United States*, 267 U.S. 132, 156-157; *Gerstein* v. *Pugh*, 420 U.S. 103, 111-116. In both *Watson* and this case the officers were in a public place, where they had every right to be, when they observed the individual whom they had probable cause to arrest. Respondent Santana, by standing in her doorway, had exposed herself to public view and could have had no reasonable expectation that the officers, seeing her there, would fail to approach her.[6] Cf. *Ponce* v. *Craven*, 409 F.2d 621,

[5] We are furnishing to counsel for respondents copies of our brief in *Watson*.

[6] The Third Circuit has been inconsistent in its treatment of contentions that an arrest warrant usually is necessary. Compare *United States* v. *Davis*, 461 F.2d 1026, with *United States* v. *Miles*, 468 F.2d 482. Because the arrest in this case was made by Pennsylvania officers, they would be bound by any more stringent state requirements. Pennsylvania law, however, permits warrantless arrests if the arrest is supported by probable cause. See *Commonwealth* v. *Bosurgi*, 411 Pa. 56, 190 A.2d 304, certiorari denied, 375 U.S. 910; *Commonwealth* v. *Smith*, 225 Pa. Super. 509, 311 A.2d 716.

624 (C.A. 9), certiorari denied *sub nom. Ponce* v. *California*, 397 U.S. 1012; *Gil* v. *Beto*, 440 F.2d 666 (C.A. 5); *United States* v. *Honore*, 450 F.2d 31 (C.A. 9), certiorari denied, 404 U.S. 1048. If we prevail in *Watson*, the propriety of respondent Santana's arrest (excluding problems caused by her retreat into the vestibule) follows directly. Indeed, the conduct of the police with respect to respondent Santana was, if anything, even more reasonable than the conduct of the Postal Inspector with respect to Watson. Although there was an opportunity to obtain a warrant for Watson's arrest, there was no comparable opportunity here unless the officers were willing to tolerate the considerable risk that Santana or Alejandro would learn of McCafferty's arrest and, upon so learning, flee or destroy the evidence in their possession. So, too, the officers knew that Santana was committing the continuing offense of possession of heroin with intent to distribute; an immediate arrest would terminate the offense as it was being committed. Both of these arguments, although they distinguish this case from *Watson*, augment rather than undermine the justification for Santana's arrest.

2. This case also presents an interesting and important variant of the situations in *Coolidge* v. *New Hampshire*, 403 U.S. 443, and *Warden* v. *Hayden*, 387 U.S. 294. In *Coolidge* the Court divided over the question whether an arrest or search warrant is necessary in order to invade a private place for the purpose of making an arrest; no view obtained a majority. As the Court recently stated in *Gerstein*,

supra (420 U.S. at 113, n. 13), "[t]he issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." In *Hayden* the Court held that a warrantless entry of a private residence to search for a suspect was constitutionally permissible where "'the exigencies of the situation made that course imperative'" (387 U.S. at 298, quoting from *McDonald* v. *United States*, 335 U.S. 451, 456).

The issue presented here is whether the *Hayden* "hot pursuit" justification, in light of the dispute reflected in the several opinions in *Coolidge*, permitted the officers to pursue respondent Santana from her doorway into her vestibule, and to arrest her, without a warrant, inside her home. This is a question of considerable importance; in many cases officers with probable cause to arrest an individual will see the individual in plain view, only to have him retreat into a "private place" that an officer ordinarily could not enter without consent of the occupants or a warrant. We do not think that the Fourth Amendment contemplates that a retreat such as here took place will provide the suspect with "sanctuary" and freedom from arrest.

In *Hayden* the officers knew that a robbery had taken place. Some hours later they learned that a man of the robber's description had entered a private residence. They promptly entered the residence to search for him; the Court held that to require the

officers to have obtained a warrant would have jeopardized the investigation because the opportunity to apprehend the suspect might be fleeting. A similar analysis applies to cases of the present sort.[7] The officers returned to Santana's residence only minutes after the commission of the crime and saw her in her doorway. They were entitled to approach her for the purpose of arresting her. But once they had announced their identity and purpose and Santana had retreated, it would have jeopardized the investigation to desist and seek a warrant. Santana could have destroyed the evidence she was known to possess and as easily could have destroyed any contraband in the house. Moreover, unless a cordon of policemen had placed her under "house arrest" while a warrant was being obtained, both respondents could have fled. There is no reason why the policies underlying the Fourth Amendment would favor "house arrest" rather than personal apprehension in the circumstances of this case.

The privacy interests identified by the plurality opinion in *Coolidge* do not condemn as "unreasonable" the official action in this case.[8] The officers had personally observed the suspect; concerns about intrusions into private spaces upon mere suspicion that a suspect may be found within are thus not presented in this kind of situation. Nor does the entry into Santana's vestibule implicate concerns about "engineered" arrests deliberately undertaken when the suspect is at home in order to validate a warrantless search of an entire residence. Santana's home was not fully searched, and the officers' entry was solely the product of Santana's own actions; moreover, the evidence sought to be used against her was found on her person or at her feet, and its seizure would equally have been accomplished had she not sought to evade arrest by entering her house. Finally, the officers did not break into an area sought to be closed against them, but entered through a doorway that respondent Santana had left open. Considering all of these factors, and balancing respondents' minimal legitimate interests in personal privacy under the circumstances against the overwhelming probable cause for Santana's arrest and the requisites of effective law enforcement, this Court should hold that the officers were entitled to arrest Santana in her vestibule.[9]

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[7] Compare *United States* v. *Lindsay*, 506 F.2d 166, 173 (C.A.D.C.): "Speed and a continuous knowledge of the alleged perpetrator's whereabouts * * * underpin this exception to the warrant requirement," with *United States* v. *Holland*, 511 F.2d 38 (C.A. 6) (continuous search but not continuous knowledge of the perpetrator's whereabouts is sufficient to justify a "hot pursuit" entry), and *United States* v. *Scott*, C.A. 9, No. 74-1373, decided February 21, 1975 (knowledge of the perpetrator's whereabouts and reasonably prompt but not continuous search is sufficient to justify a "hot pursuit" entry).

[8] As this Court has pointed out in analogous contexts, the test is not whether it would have been reasonable to get a warrant, but whether the official action was reasonable. *Cooper* v. *California*, 386 U.S. 58, 62; *United States* v. *Edwards*, 415 U.S. 800, 807.

[9] Those courts of appeals that have considered the constitutionality of warrantless arrests in private places in light of

CONCLUSION

Because the court of appeals wrote no opinion, we have no record of its view on the justifications for respondent Santana's arrest that we have outlined above. Ordinarily, this Court would not undertake plenary review without the benefit of the views of the court of appeals. However, because this case is in many ways a logical counterpart to *Watson*, in which certiorari already has been granted, and because it would be advantageous to law enforcement officers for this Court to narrow the scope of uncertainty in the law of arrest that has been created by *Coolidge*, we submit that the Court may wish to consider granting certiorari and setting this case for argument in tandem with *Watson*. If it does not do so, it should hold this case pending disposition of

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Coolidge have used a balancing formula to ascertain the reasonableness of the arrest in light of the attendant circumstances. For example, the District of Columbia Circuit (*Dorman* v. *United States*, 435 F.2d 385 (*en banc*)) considers a number of factors, including the nature of the offense, the presence of fresh pursuit, the time of day, the requirement of a forcible entry, whether there is a clear showing of probable cause, the degree of certainty with which the officers know that the suspect is on the premises, and whether there is reason to believe the suspect is armed. Other courts have used similar groupings of factors. See, *e.g.*, *United States* v. *Bazinet*, 462 F.2d 982 (C.A. 8), certiorari denied *sub nom. Knox* v. *United States*, 409 U.S. 1010; *United States* v. *Morris*, 477 F.2d 657 (C.A. 5), certiorari denied, 414 U.S. 852.

Watson and remand to the court of appeals for further proceedings consistent with that disposition.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

JEROME M. FEIT,
TERENCE M. BROWN,
Attorneys.

JULY 1975.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-502

UNITED STATES OF AMERICA

vs.

PATRICIA McCAFFERTY
DOMINGA SANTANA
WILLIAM ALEJANDRO

Philadelphia, Pa., November 13, 1974

Before HON. LOUIS C. BECHTLE, J.

GRANTING OF
MOTIONS TO SUPPRESS

PRESENT:

THOMAS J. McBRIDE, ESQ.,
Assistant United States Attorney
for the Government

DENNIS EISMAN, ESQ.,
for Dominga Santana

MARK A. LUBLIN, ESQ.,
for William Alejandro

LEWIS H. DUNBAR
Official Court Reporter
3051 U.S. Court House
Philadelphia, Pa. 19107
WAlnut 5-9480

[2] THE COURT: All right. The court believes that the key to this case—well, first of all, the court understands that the offenses for which the defendants, Alejandro and Santana, are indicted have to do with their possession of the narcotics found after entry into the house; is that correct?

MR. EISMAN: That is right.

THE COURT: And not the offense having to do with the sale by McCafferty to Police Officer Gilletti. That's the court's understanding from a reading of the indictment and the quantities and also from the testimony.

The key to the case in the court's view is the basis upon which a warrantless entry into a person's residence can be made for either an arrest or a search. If these events had taken place on a street corner or in or about a moving automobile, it might be a different case.

The court's understanding is that the premises 2311 North Fifth Street were the residence of defendant, Santana, and not a third party residence

or a residence from which she could have been expected to leave.

When she was seen by the officers, presumably she didn't know that she was being watched, but when she saw them, she was in the doorway of the residence.

The evidence disclosed that the house was a typical two-story Philadelphia row house containing one front door and one back door and that there were nine police officers [3] at least available including Officer Gilletti who was on his way back to the police station or some place with Defendant McCafferty and possibly another police officer.

The court believes that the offense is a grave offense and not a complacent offense in keeping with the definition in some of the cases as to the kind of an offense that could warrant under other circumstances a warrantless search or entry.

There was strong probable cause that Defendant Santana had participated in the transaction with Defendant McCafferty. One of the police officers indicated or testified that the mission was to arrest Defendant Santana. Another police officer testified that the mission was to recover the bait money. Either one would require a warrant, one a warrant of arrest under ordinary circumstances and one a search warrant.

There was strong evidence that the defendant was on the premises. She was seen there and it was known that this was her premises that she either owned or occupied.

The execution of these events took place in the day time under the law, that is, up to 10 p.m. at night, as specified in the Federal Rules of Criminal Procedure. There is no evidence that either defendant was armed which is an important consideration in considering whether or not a warrantless arrest or search can be undertaken. There was no evidence that there was a need to prevent the escape of either [4] defendant. In one instance it was a defendant's home or where she lived, in any event, at Santana's home, and there were presumably enough police officers when they made their first move. One or two could have been dispatched to the rear to watch any possible rear exit. There was no evidence that either defendant made an effort to flee.

The court believes that the move by Defendant Santana into the house was a natural response of a person standing in a doorway under the circumstances that faced her when the police officers ran up the steps as opposed to an effort to escape.

The money was found in the Defendant Santana's pocket as opposed to any other surreptitious location within the house under a floorboard or behind a picture or dispersed through other persons. The presence of the money in Defendant Santana's pocket indicates that there was no basis to conclude that it was to be destroyed.

The court does not believe that the reentry from the doorway into the house by Defendant Santana can be considered under the cases to be "in hot pursuit." "Hot pursuit" is considered by the court

to mean a usual kind of a chase in and about public streets or places or even in and about a building. If the chase had taken place on the streets and had ended up into the house, it could be part of the final portion of an episode of hot pursuit.

[5] Under all the circumstances the court believes that the restricted requirements having to do with warrantless entrance into residences apply and if this event had taken place in other than a residence it may very well have supported a warrantless entry for either search or arrest, but under the circumstances the court believes that a warrant could have been obtained for either a search or an arrest.

The court believes it is a very close case and the court understands also that under the extreme emergency posture of a case like this where many unknown events are occurring, police officers oftentimes have difficult decisions to make and it is much easier for a court on reflection to analyze and pick apart or even indeed criticize, which this court is not doing, the action of police in this case.

Nevertheless, the court believes that under the circumstances the heroin which supports Counts II and III should be suppressed and not offered as evidence in the prosecution against Defendants Alejandro and Santana.

The question of the marked money is not as important because I don't know how that would be relevant in the case. But nevertheless that should be suppressed also as evidence.

Do counsel wish to speak to the court on any matter about the court's ruling?

MR. EISMAN: No.

[6] MR. LUBLIN: No.

THE COURT: All right. The evidence will be suppressed.

Will this case proceed to trial?

MR. McBRIDE: No, sir.

THE COURT: You can advise the court if it will and we can proceed to that.

All right. That's all.

(Concluded at 11:45 a.m.)

Certify that the foregoing is a correct transcript from the record of proceedings in the above entitled matter.

Date—11-15-74

/s/ Lewis H. Dunbar
Official Court Reporter

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74-2275

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA McCAFFERTY, DOMINGA SANTANA and WILLIAM ALEJANDRO

Appeal from the United States District Court for the Eastern District of Pennsylvania (Criminal No. 74-502)

Argued March 21, 1975

Before: ALDISERT, GIBBONS and GARTH, *Circuit Judges*

JUDGMENT ORDER

After considering the contention raised by appellant, to-wit, that exigent circumstances existed which justified appellee's warrantless arrest; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN Clerk

BY THE COURT,

/s/ Aldisert
Circuit Judge

DATED: Mar. 21, 1975

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74-2275

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA MCCAFFERTY, DOMINGA SANTANA AND WILLIAM ALEJANDRO

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: May 8, 1975

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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-19

UNITED STATES OF AMERICA, PETITIONER

v.

DOMINGA SANTANA AND WILLIAM ALEJANDRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JULY 3, 1975

CERTIORARI GRANTED OCTOBER 14, 1975

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[1] A copy of the transcript of the district court's oral decision granting Respondents' motion to suppress was filed as Appendix A to the petition for a writ of certiorari (pp. 1a-6a). The judgment of the court of appeals and the court of appeals' denial of the government's petition for rehearing and suggestion of rehearing *en banc* were reproduced as Appendix B (p. 7a) and Appendix C (p. 8a) to the petition.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-502

vs.

PATRICIA McCAFFERTY, DOMINGA SANTANA AND WILLIAM ALEJANDRO

RELEVANT DOCKET ENTRIES

1974	
Aug. 27	True bill.
Sept. 6	PLEA: NOT GUILTY to Count #1, as to deft McCafferty; deft allowed 15 days to file motions. [TGL]
Sept. 19	PLEA: NOT GUILTY as to Count #2, as to deft Santana; deft allowed 30 days to file motions. [EEN]
Sept. 19	PLEA: NOT GUILTY to Count #3, as to deft Alejandro; deft allowed 30 days to file motions. [EEN]
Sept. 26	Appearance of Mark A. Lublin on behalf of deft Alejandro, filed.
Oct. 18	Deft Santana's motion for relief from illegal search and seizure, with memorandum of law in support thereof, filed.
Oct. 21	Deft Alejandro's motion for the suppression of evidence obtained through illegal search and seizure, with memorandum of law in support thereof, filed.
Oct. 25	Govt's motion to dismiss deft Alejandro's motion for the suppression of evidence obtained through illegal search and seizure, filed.
Oct. 25	Govt's motion to dismiss deft Santana's motion for relief from illegal search and seizure, filed.
Oct. 29	Deft Alejandro's reply to Govt's motion to dismiss deft's motion for the suppression of evidence obtained through illegal search and seizure, filed.
Oct. 30	Deft Santana's reply to Govt's motion to dismiss deft's motion for relief from illegal search and seizure, filed.

Oct. 31	ORDER [dated 10-30-74] that the motion of deft Santana for relief from illegal search and seizure is DENIED for the reason that it has not been filed in accordance with the provisions of Local Rule 11; leave granted to file in accordance therewith, filed.
	11-1-74 Entered & copies mailed.
Oct. 31	ORDER [dated 10-30-74] that the motion of deft Alejandro for suppress of evidence obtained through illegal search and seizure is DENIED for reason that it has not been filed in accordance with local Rule 11; leave is granted to file in accordance therewith, filed.
	11-1-74 Entered & copies mailed.
Nov. 11	Govt's answer to deft Santana's motion for relief from illegal search and seizure, with memorandum in support thereof, filed.
Nov. 11	Govt's answer to deft Alejandro's motion for the suppression of evidence obtained through illegal search and seizure, with memorandum in support thereof, filed.
Nov. 11	Deft Alejandro's re-filed motion for the suppression of evidence obtained through illegal search and seizure, with memorandum of law in support thereof, filed.
Nov. 12	Deft Santana's re-filed motion for relief from illegal search and seizure, with memorandum of law in support thereof, filed.
Nov. 12	HEARING SUR motion of deft Alejandro re: suppression of evidence and sur motion of deft Santana re: relief from illegal search and seizure; witnesses sworn; adjourned until 11-13-74.
Nov. 12	CHANGE OF PLEA: GUILTY to Count #1, as to deft McCAFFERTY; pre-sentence report ordered; bail continued.
Nov. 13	CONTINUED HEARING SUR defts Santana and Alejandro's motions to suppress: motion of deft Alejandro for suppression of evidence is GRANTED; Motion of deft Santana for relief from illegal search and seizure is GRANTED.
Nov. 19	Transcript of testimony of Hearing re: motions to suppress of 11 filed.
Dec. 10	Govt's notice of appeal, filed.
Dec. 10	Copy of Clerk's notice of appeal, filed.

In the United States Court of Appeals for the Third Circuit

Case No. 74-2275

UNITED STATES OF AMERICA

vs.

PATRICIA McCAFFERTY, DOMINGA SANTANA AND WILLIAM ALEJANDRO

RELEVANT DOCKET ENTRIES

Date	Proceedings
1974	
Dec. 19	Copy of Notice of Appeal, rec'd. December 12, 1974, filed.
	Record, rec'd. December 18, 1974, filed. (trans of testimony of hear re: motions to suppress filed in DC on 11/19/74).
	Order (Clerk) directing that if the transcript is desired and has not been filed, it shall be ordered forthwith, with the proper arrangements for payment to be made; directing the court reporter to file the transcript on or before Jan. 20, 1975; directing appellant's brief and the appendix be filed and served within 30 days of the filing of the transcript in the DC, or within 30 days of the date of this order, whichever is later; directing appellee's brief be filed and served within 21 days after appellant's brief and the appendix are filed and served and directing the Clerk of the DC to deliver a copy of this order to the court reporter, filed.
	Certified copy of above order to C of DC and Ct. Rep.
Dec. 30	Appearance of Thomas J. McBride, for appellant, filed.
1975	
Jan. 15	Appearance of Dennis H. Eisman, Esq.; Needleman, Needleman, Tabb & Eisman, Ltd. for appellee, Dominga Santana, filed.
Jan. 20	Brief for appellant and appendix, filed. (7 cc.). Certificate of service by mail on January 20, 1975 appears on Page 20 of brief.
Feb. 7	Brief for appellee, filed. Certificate of service by mail on February 10, 1975 appears on last page of brief.

Feb. 25.....First Supplemental Record (Nos. 28/30), filed.
Mar. 6.....Order (*Aldisert*, C.J.) dated March 5, 1975 directing 10 minutes oral argument time for each side, filed.
Mar. 21.....Argued. Coram: Aldisert, Gibbons and Garth, C.J.
Mar. 21.....Judgment order, (*Aldisert*, Gibbons and Garth, C.J.) affirming the judgment of the District Court, filed.
Apr. 4.....Motion by appellant for a 21-day extension of time within which to file a petition for rehearing, from its present due date of April 4, 1975 to and including April 25, 1975, filed. (4 cc.). Certificate of service attached.
Apr. 8.....Order (*Aldisert*, C.J.) granting appellant's motion for a 21-day extension of time within which to file a petition for rehearing, from its present due date of April 4, 1975 to and including April 25, 1975, filed.
Apr. 25.....Petition for rehearing filed. (11 cc.). Certificate of service attached.
May 16.....Certified judgment-order in lieu of formal mandate issued.
May 16.....Record and First Supplemental returned to C. of D.C.
May 8.....Order (Seitz, Ch.J., Van Dusen, *Aldisert*, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, C.J.) denying petition for rehearing.
May 20.....Receipt for record from Clerk of D.C., filed.
June 2.....Copy of letter dated May 30, 1975 to Honorable Robert H. Bork, Solicitor General of the U.S., advising that Supreme Court extended time for filing of petition for writ of certiorari to and including July 7, 1975, received from Clerk of S.C.
July 10.....Notice of filing on July 5, 1975 of petition for writ of certiorari, received from Clerk of S.C., filed (S.C. No. 75-19).

In the United States District Court for the Eastern District of Pennsylvania
Criminal No. 74-502
UNITED STATES OF AMERICA
v.
PATRICIA McCAFFERTY, DOMINGA SANTANA AND WILLIAM ALEJANDRO
Charge: Distribution of and possession with intent to distribute a narcotic drug controlled substance.

INDICTMENT

COUNT I

The Grand Jury charges:

On or about the 16th day of August, 1974, at Philadelphia, in the Eastern ict of Pennsylvania, PATRICIA M3C(FF5896, knowingly and intention-District of Pennsylvania, PATRICIA McCAFFERTY, knowingly and intentionally did unlawfully distribute about 42 grains of Heroin, a schedule I narcotic drug controlled substance.

In violation of Title 21 United States Code, Section 841.

COUNT II

The Grand Jury further charges:

On or about the 16th day of August, 1974, at Philadelphia, in the Eastern District of Pennsylvania, DOMINGA SANTANA, knowingly and intentionally did unlawfully possess with the intent to distribute about 587 grains of Heroin, a schedule I narcotic drug controlled substance.

In violation of Title 21 United States Code, Section 841.

COUNT III

The Grand Jury further charges:

On or about the 16th day of August, 1974, at Philadelphia, in the Eastern District of Pennsylvania, WILLIAM ALEJANDRO, knowingly and intentionally did unlawfully possess with intent to distribute about 54 grains of Heroin, a schedule I narcotic drug controlled substance.

In violation of Title 21 United States Code, Section 841.

A true bill:

/s/ RICHARD B. TILLSON,
Foreman.

/s/ ROBERT E. J. CURRAN,
United States Attorney.

[TRANSCRIPT OF SUPPRESSION HEARING]

[TESTIMONY OF OFFICER MICHAEL GILLETTI]

* * * * * *

11 DIRECT EXAMINATION

By Mr. McBRIDE:

Q. Officer Gilletti, by whom are you employed?

A. By the Philadelphia Police Department.

The COURT. Keep your voice up, please.

By Mr. McBRIDE:

Q. And in what capacity?

A. I work as an undercover agent with the narcotics unit.

Q. How long have you been working with the narcotics unit?

A. A little over two years, sir.

Q. Were you working on the date of August 16, 1974?

A. Yes, sir, I was.

Q. Did you have occasion on that day to take part in an investigation concerning the three defendants in this case?

A. Yes, sir, I did.

Q. Would you relate to the court what part you took
12 in that investigation?

A. Yes, sir. Your Honor, on Friday, August 16th of this year——

The COURT. You can speak to Mr. Munoz; you don't have to look at me. All right?

The WITNESS. Yes, sir.

At approximately 6:35 P.M., I made a telephone call to No. DA-4-2328. At that time I had a telephone conversation with one Mrs. Patricia McCafferty in reference to my purchasing a bundle of heroin. That number was given to me by Mrs. McCafferty on an occasion before this date or the purpose whenever I wanted to purchase heroin to call that number.

At that time I told Mrs. McCafferty I wanted to purchase a bundle.

She says, "O.K., it is going to cost you $115 and we will go down to Mom Santana's for the dope."

At that time I told Mrs. McCafferty that Mom's house is pretty hot right now and it is being watched by the police.

Mrs. McCafferty says that Mom moved, she don't live on Sixth Street any more; she lives at 2311 North Fifth, around Fifth and Dauphin, and that the police don't know that Mom is living there, everything is cool.

At the conclusion I agreed——

The COURT. Just a moment. Take your time.

Very well, proceed, Officer Gilletti.

The WITNESS. At that time I agreed to pick Mrs.

13 McCafferty up at Fifth and Ashdale Streets. I hung up the telephone.

I had a conversation with Sergeant Pruitt, 8549, who was my supervisor at the unit.

The COURT. Could I just interrupt a minute?

Is there a witness in the courtroom?

Mr. McBRIDE. I don't know who that is, sir.

The COURT. All right. The officer pointed. I don't know if he pointed to this person or not.

All right, go ahead.

The WITNESS. I told Sergeant Pruitt of the conversation that I had with Mrs. McCafferty. I told him that I had a bundle buy set up and I further told him that I had $110 that I had between myself and Officer Dais, that I was going to record the serial numbers for the purchase.

The COURT. All right, now, hold it.

The WITNESS. I then took five $20 bills and one $10 bill of our own money, I initialed each bill on the forehead with the initials "M.G.," and then we recorded each serial number on a 3 by 5 index card. I at that time gave the card to Sergeant Pruitt.

Sergeant Pruitt got a back-up team and he said that they were going to trail me to find where we buy the dope and make an arrest from there if that was the case.

At approximately 7 P.M. I left the unit, 22nd and Hunting Park. I drove over to Fifth and Ashdale Streets. I met
14 with Mrs. McCafferty.

She got into my automobile and directed me to drive to the area of Fifth and Dauphin. I pulled up on the southwest corner of Fifth and Dauphin. Mrs. McCafferty asked me for the money. I gave her the $110. She counted it and then she told me, "You are short $5. I told you $115."

I then told her that that was all I had, and she says, "O.K., I will go in and see if Mom will let me go for $5."

I gave her the money. She got out of the automobile. She walked to 2311 North Fifth Street. There were a few Puerto Rican kids standing outside. She patted them on the head and then she had a conversation with Alejandro who was sitting on

the steps. Alejandro and McCafferty got up and walked into 2311 North Fifth Street.

At approximately five minutes later, Mrs. McCafferty come out. About five minutes later, Mrs. McCafferty came out of the house. She walked directly back to my automobile and she got in. She said, "O.K., let's go."

So I said, "Well, do you have the dope?"

She said, "I have it."

So I said, "Well, I would like to see it before we leave."

I started to pull out of the parking spot north on Fifth Street. Mrs. McCafferty reached down into her bra. She took out a tinfoil package, opened it up, and handed me
15 several glasine packets of a brownish-white powder.

At that time I pulled over to the side—the other police were waiting in the are—I identified myself to Mrs. McCafferty as a police officer by showing her my badge and identification. I told her she was under arrest for illegal sale of heroin and then I warned her of her constitutional rights. At that time I told her we were going to send the police back to 2311 North Fifth Street and I wanted to know where the money was so that we may recover it. She then said, "Mom has the money."

Agent Pruitt pulled up alongside of me, along with other members of my unit. I showed them the bundle of heroin and I told them, "Mom Santana has the money."

They then went directly back to 2311 North Fifth Street.

Myself and Policeman Jumper proceeded up the narcotics unit. The items that I purchased I placed on Property Receipt No. 543956 and I submitted those items to the Police Chemical Lab for analysis.

Mr. McBride. Cross examine.

The Court. Mr. Lublin?

* * * * *

CROSS EXAMINATION

22 By Mr. Eisman:

Q. Officer Gilletti, you had made prior buys from Miss McCafferty; is that correct?

A. That's correct, sir.

Q. And in relation to this incident on August 16, when was the last time you had made a purchase from her?

A. I can tell you.

The Court. Yes, refer to anything you must and keep
23 your voice up, please. Take your time.

A. The last purchase I made from Miss McCafferty, Counsel, was on Tuesday, July 9, of this year.

By Mr. Eisman:

Q. And you had made a purchase, other purchases, before that also, had you?

A. That's correct, Counselor.

Q. When were they?

A. I made one other.

Mr. McBride. Objection. I fail to see the relevance of that to this particular issue at hand.

The Court. I will permit it within reason. It seems to be going somewhat far afield, but his credibility is in issue. Objection overruled.

A. The first purchase I made from Miss McCafferty, Counsel, was on June 20 of this year.

By Mr. Eisman:

Q. And you made how many purchases altogether?

A. I made two and counting today is three.

Q. Had any other officers working with you made any other purchases from her?

A. Policeman Jumper made a purchase off the defendant prior to July—June 20, but I don't have that report.

Q. But you were aware of that on August 16; isn't that correct?

A. Yes, sir, I was.

24 Q. As a matter of fact, had you obtained warrants for her arrest for those three prior sales or had Officer Jumper obtained warrants?

A. I had several still working on the defendant and in the area.

Q. But you had knowledge that she had sold you heroin on three prior occasions, you or the other police, three prior occasions, on August 16; isn't that correct?

A. I certainly had, yes.

Q. And I assume that prior to August 16 you were aware that the substance which she had sold you was heroin; is that correct?

A. That's correct. That's why I returned to her.

Q. Now, on August 16 when you called her, what was the purpose of your call?

A. The purpose of the call was to purchase a bundle of heroin.

Q. And whom did you want to purchase it from?

A. Whom did I want to purchase it from? From the defendant. That's why I called her.

The COURT. The defendant, McCafferty?

The WITNESS. Mrs. McCafferty, that's correct.

The COURT. All right.

By Mr. EISMAN:

Q. And at that time what did she tell you?

A. She told me that, "We can get the bundle. It is going to cost you $115."

Q. And did she tell you where she was going to get it?

25 A. Yes, she did.

Q. And where did she tell you she was going to get it?

A. She told me we were going to Mom Santana's house at 2311 North Fifth Street, in the area of Fifth and Dauphin.

Q. Now, you knew Mom Santana, didn't you?

A. I certainly—yes, sir, I did.

Q. How did you know her?

A. From prior investigations involving narcotics.

Q. As a matter of fact, had you been in that house prior to that day?

A. No, sir, I wasn't.

Q. Were other police that you knew or were aware of in that house prior to August 16?

A. No, I wasn't. I was there once but I wasn't in the house. Two days prior to this purchase, I couldn't get into the house. There was somebody outside that knew me as a police officer.

Q. Oh. So you had been to this house and you knew Mom Santana was there but you couldn't get in there; is that right?

A. No, sir, I was told that two days prior. I had no knowledge that she was there. As far as we were concerned, you know, we didn't know her whereabouts.

Q. Well, somebody had told you she was there, didn't they?

A. Mrs. McCafferty told me.

Q. Well, you had been at 2311 North Fifth Street two days prior with an informant, hadn't you?

26 A. That's correct. I just stated that I said at that address——

Q. According——

The COURT. Let him finish the answer.

You just stated that and what?

The WITNESS. I went to that address. I did not go into the house. I did not see Mom Santana on that date.

By Mr. EISMAN:

Q. But an informant had told you she was there, didn't he?

A. He had suggested that's where she was but it is—yes, sir, that's correct.

Q. This is one of your police informants had told you; is that right?

A. He did, yes, sir.

Q. The only reason you didn't go, because there were some people there who knew you to be a policeman; is that right?

A. Yes.

Q. Now, had Mrs. McCafferty ever sold you anything purporting to be heroin that wasn't heroin on those other three occasions? You or the other three officers?

A. No, she didn't.

Q. And when you had this discussion with her with regard to purchasing the narcotics on August 16, you believed that to be true, didn't you?

A. I am sorry, Counselor, I didn't understand.

27 Q. You believed Miss McCafferty's statement as to where she was going to get these items to be true, didn't you?

A. I had an idea but I wasn't sure because she had stated before we were going somewhere and we ended somewhere else. That's why we weren't prepared for this.

Q. Well, she told you that she was going to go to 2311 North Fifth Street, didn't she?

A. That's all she did was tell me, yes, sir.

Q. And she told you that's where Mom Santana lived; is that right?

A. She told me that, yes.

Q. And you knew from an informant two days prior that the informant had told you that this is where Mom Santana lived; is that correct?

A. No, sir. Again it was just somebody told me. I had no knowledge that she was in fact there.

Q. Didn't the informant tell you that this is where Mrs. Santana lived?

A. Yes, sir.

Q. And that was two days prior to this incident?

A. Correct.

Q. And you had gone to the house for the purpose of purchasing heroin because you believed her to live there, isn't that right, two days prior to the arrest?

A. I was going to find out if she did in fact live there,
28 yes, sir, but I didn't.

Q. You didn't because there was somebody there that knew you to be a policeman?

A. That's correct.

Q. O.K. Now, when you went there with Miss McCafferty on that night you made certain arrangements; isn't that correct?

A. Arrangements insofar as where to meet her, yes.

Q. O.K. You met her at an area close to this house at 2311 North Fifth Street; is that right?

A. No, sir.

Q. Where did you meet her?

A. I met her a half a block from her residence, at Fifth and Ashdale.

Q. And then she drove you there; is that right?

A. She directed me to Fifth and Dauphin.

Q. And you knew where you were going because she had told you that Mom lived at 2311 North Fifth Street; is that right?

A. Yes, I was hoping, yes. I had an idea that's where we were going.

Q. In fact, you had made certain arrangements, you had certain moneys, Xeroxes, is that correct, before you left the police station?

A. I pre-recorded certain money before we left and also marked money.

Q. And you informed your superiors as to what you
29 were doing, where you were going?

A. Where we intended to go, yes.

Q. And you made arrangements at the police station as far as setting up back-up teams?

A. That's correct.

Q. And what was the plan if you did make this purchase?

Mr. McBride. I object to that, sir. The issues before this court are the facts as to what happened on that day, not perhaps what would or would not have been had something else happened.

Mr. Eisman. Your honor, I will show the relevancy of this line of questioning.

The Court. I will permit it.

Mr. Eisman. Thank you.

The Court. Within limits.

By Mr. Eisman:

Q. What were the plans you made if you in fact did make this purchase that Miss McCafferty had told you?

A. The plans were to make the purchase and then make an arrest following that purchase and also to confiscate the money which was used.

Q. O.K. Now, what exactly were the plans?

A. Just as I stated to you. I did not make the plans insofar as getting down and saying, "This is what we are gong to do."

Q. O.K. You had a discussion with your sergeant; isn't that right?

30 A. That's correct.

Q. And you discussed the purchase of the drugs; right?

A. Yes, sir.

Q. And what did you say, what did he say, with regard to if the sale did go down, so to speak?

A. I simply went to Sergeant Pruitt as I always do and I

told him, "Sarg, I got a bundle buy set up. I would like a back-up team because if it goes down, you know, it is going to be a bubble," what we call a buy bust, an arrest right there on the scene, and from there, my known procedure was to let the sergeant handle how he was going to back me up or what he was going to do insofar as backing me up.

Q. Didn't you explain to him what the circumstances of the buy were supposed to be, that McCafferty was supposed to buy from Santana?

A. Yes, as I stated earlier, I wrote certain serial numbers on a 3 by 5 index card. I put a short story which I will read if counsel wants it and I signed it and gave it to my sergeant.

Q. A short what?

A. A story in reference to where this money was being pre-recorded.

Q. O.K. Why don't you read it?

A. It just reads, "This list is given to Sergeant Pruitt, No. 8549, by Policeman Gilletti, 2078, for heroin purchase money to be used on 8–16–74 at approximately 7:30 P.M."

In parentheses it also reads, "(May be going to 2311
31 North fifth Street.)"

Q. I see. So you knew——

The COURT. Can we have that marked G–1 for identification, please?

Mr. EISMAN. Maybe we could mark it D–1.

The COURT. All right.

(Index card was marked Exhibit D–1 for identification.)

By Mr. EISMAN:

Q. Now, did you discuss with Sergeant Pruitt as to how the money was to be recovered?

A. I don't understand the question, Counselor.

Q. Well, the money was supposed to be going to 2311 North Fifth Street according to that story or might be going.

A. Maybe, right.

Q. Right. And did you discuss with Sergeant Pruitt how that money was going to be recovered?

A. We had no idea until the actual circumstance, you know.

The COURT. So the answer is "No"?

The WITNESS. No, sir, I didn't know.

By Mr. EISMAN:

Q. You made no plans; is that right?

A. No, sir.

Q. Now, in this report does this report say anything about seeing Alejandro on the steps of that house or anybody else on the steps?

32 The COURT. Can you tell us without reading it? Have you memorized that report?

The WITNESS. No, sir, I didn't. I read that once.

The COURT. If you want him to read the contents of a seven-page report which is single spaced typing, you had better show it to him. It either does or doesn't.

Mr. EISMAN. I will withdraw the question.

The COURT. All right. Next question.

By Mr. EISMAN:

Q. Were you in radio communication with your fellow police officers?

A. No, sir.

The COURT. At which time?

By Mr. EISMAN:

Q. At the time you were in the car with Miss McCafferty?

The COURT. The first time or the second time or either time?

Mr. EISMAN. Well, either time.

A. No, sir.

By Mr. EISMAN:

Q. And where did you arrest McCafferty?

A. Where did I arrest her?

Q. Yes.

A. On North Fifth Street. It was probably the end of the
2600 block North Fifth, the beginning of 27. I drove about a block or a block and a half from the time that she got
33 into the car. It is when she handed we the bundle and I immediately pulled over to the side.

Q. All right. Now, at that time did you see anybody from the house watching you?

The COURT. What house?

By Mr. EISMAN:

Q. The house at 2311 North Fifth Street?

A. Did I see them watching me?
Q. Yes.
A. No, sir.
Q. Did you indicate to your fellow officers that anybody in the house knew that you had arrested Miss McCafferty?
A. No, sir. I simply pulled up and showed him the bundle and told him that Mom Santana has the money.
Mr. EISMAN. I have no other questions.
The COURT. Mr. Lublin?
Mr. LUBLIN. Yes, sir.
The COURT. Any questions that would not be repetitious will be permitted
Mr. LUBLIN. I don't believe I will be repetitious, Your Honor.
By Mr. LUBLIN:
Q. Prior to this time you made three—let me preface; I want to make a short statement first and then I am going to get into a question that will follow—prior to this time you had
34 made three purchases from Mrs. McCafferty. During any of those three purchases did you ever discuss Mom Santana or any of Mrs. McCafferty's sources of drugs?
The COURT. You mean prior to this time he made two or prior to this time he made three?
Mr. LUBLIN. I am sorry, the two prior, that he had made prior to this. You are exactly right, Your Honor.
The COURT. I don't want to change your question. You might have some purpose in saying that.
Mr. LUBLIN. No.
The COURT. But I thought maybe you misunderstood.
Mr. LUBLIN. I was in error, Your Honor.
The WITNESS. All right.
The COURT. Yes, sir.
By Mr. LUBLIN:
Q. You had discussed Mom Santana?
A. We didn't discuss it. Mrs. McCafferty mentioned, you know—I had a habit when we copped, I said, you know, "Where are we going" or, "Who do we cop from," and one other occasion, she did mention Mom Santana but she didn't say "Mom Santana"; she said, "Mom at Sixth and Glenwood," which was a different location, a different time.

Q. Now, would it be fair to say that at this time you were also conducting an investigation of Mom Santana?
A. Myself and my partner were working the area.
35 Mom Santana was part of that area, yes, sir.
Q. O.K. And you had received prior information concerning the sale of drugs by Mom Santana?
A. Numerous occasions, yes, sir.
Q. Was any of this information received from police informants?
A. Much of the information was received in that manner, yes, sir.
Q. In fact, you had known where Mom Santana lived, the prior address, two days before this incident occurred; isn't that correct, Officer?
A. As I just stated shortly ago, no, sir, I didn't. I was told that she lived there but I had no——
Q. Well, when you said earlier you were told, were you told by a police informant?
A. Yes, sir, I was.
Q. Was that informant a reliable informant to the best of your knowledge?
A. I don't recall.
Mr. MCBRIDE. I object to this sir. At this point I think the officer has made his position clear that he did not know it of his own knowledge. He did not know it because someone had told him, and whether that person is reliable or unreliable I don't think is really relevant to the issue of whether he in fact knew it or didn't know it. He stated he did not have a chance to verify it but he had had reports, now, reliable or unreli-
36 able. That's as much as he had.
The COURT. Yes. What would be the purpose of this, Mr. Lublin?
Mr. LUBLIN. May we see Your Honor at side bar? I would be more than happy to give the reasons.
The COURT. No, it won't be necessary at side bar because there is no jury here, but secondly I want to make sure the defendants understand what is being said, too.
What would be the purpose of knowing if an informant who

gave this witness some general information about presumably defendant Santana might be a reliable or unreliable informant?

Mr. LUBLIN. Could the witness be excused while I explain the reason, Your Honor?

The COURT. No.

Mr. LUBLIN. O.K.

The COURT. I think the witness has said several times he didn't know if this lady lived there or not. He suspected that she might be there. But presumably his transaction was not with her but with Defendant McCafferty. So whether or not Mrs. Santana or Mom Santana was there or was not there or lived there or did not live there or leased there or was a lessor or lessee or a squatter or whatever at those premises doesn't seem to bear upon any relevant issue as to the arrest of Mrs. McCafferty which is all we have heard about so far, so with that frame of reference, what is the importance of the question as to the informant?

37

Mr. Eisman, do you want to speak to it? I mean, you may have a reason to advance that Mr. Lublin would want to share?

Mr. EISMAN. Your Honor, the reason I had asked that line of questioning—and I thought I had got the answer that I was seeking—the reason I think this is relevant is to whether this officer had reason to credit his other informant, that fact plus the residence of Mr. Santana when he went there to attempt to make a buy two days prior.

The COURT. Well, he went because Mrs. McCafferty said, "That's where we are going." That's his testimony. She said, "We are going to 2311 North Fifth to complete this transaction and that's where Mom Santana is," but that's the basis of his testimony.

Mr. EISMAN. But this is relevant to what knowledge he had as far as ths premises which he marked on D–1 and which he relates in his 49 report that an informant had told him that Mom Santana was living there even before Mrs. McCafferty told him that she was living there.

The COURT. Is that so, you understood that she lived there before Mrs. McCafferty told you that?

The WITNESS. No, sir, Your Honor. I said that I was told that but I had no personal knowledge that she did in fact live there.

The COURT. And who told you that?

38

The WITNESS. A police informant.

The COURT. And did you have any reason to believe that that was a true statement or you were unsure or you believed it was untrue?

The WITNESS. I had no reason to believe one way or the other. It was the first time myself I ever worked with that particular informant.

The COURT. Did you rely on that statement at all in carrying out your duties in connection with this particular episode?

The WITNESS. No, sir.

The COURT. All right. Objection sustained.

* * * * *

50

By Mr. LUBLIN.

Q. At 6:35 P.M. you made a phone call to Patricia McCafferty; is that corect?

A. Yes, sir.

Q. O.K. Where did you make this phone call from?

A. From the Narcotics Unit Headquarters, 22nd and Hunting Park Avenue.

Q. Did anyone listen in on that conversation?

The COURT. To your knowledge?

By Mr. LUBLIN.

51

Q. To your knowledge?

A. To my knowledge, no, sir.

Q. You informed her that you wished to purchase hereoin; is that correct?

A. That is correct.

Q. And she told you she would take you to Mom Santana's house?

A. That is correct.

Q. What did you then inform her or what did you next say to her?

A. I don't recall exactly. As far as I know, nothing, except where to pick her up at.

Q. O.K. Did you tell her that Mom's house was being watched by the police?

A. Oh, yes, I said that, that's correct.

Q. Where did you get the information that Mom's house was being watched by the police?

A. I was part of the police that was watching Mom's house at 6th and Glenwood Avenue.

Q. For how long a period were you watching that at 6th and Glenwood?

A. I don't recall, any time I was in the area. It is just a normal complaint that we get all the time.

Q. I am sorry, Officer, I didn't hear you?

A. It is a complaint, whenever I was there.I made no specific effort to go out and watch that one particular home. I work on the buy scene, Counsel. I don't just take out a search
52 warrant and hit the place. I work on it until I think I can get into the house and make a purchase from it.

Q. Well, at that time, you told her that the place was being watched by the police. That would be other policemen also; isn't that correct?

A. That's correct.

Q. O.K. Would it be fair to say that a constant surveillance was being held on Mom Santana's house?

A. No, sir.

Q. And it would be a hit or miss, as you have described it to us earlier?

A. As far as I am concerned. There may be agents—there are other agencies watching her but I don't know of any constant surveillance. I don't know how they go about what they are doing.

Q. Now, you had stated earlier that you received a number of complaints about Mom Santana; is that correct?

A. During the past two years, yes, sir.

Q. How many of those complaints were from informers?

A. I don't recall.

Q. You don't recall at all?

A. No, sir.

Q. O.K. Well, so that we can focus a little better, would it be more than five or less than, five to the best of your knowledge?

A. I have no idea, Counselor.

Q. No idea whatsoever?

53 A. No, sir.

Q. All right. Can you think of any specific information that you received pertaining to Mom Santana from any informant?

Mr. McBride: I object to that, sir. It is broad. We are covering a two-year period. Any information he received from any other informants on Mom Santana? That's a terribly broad question.

Mr. Lublin. I will make it more specific.

The Court. Yes, would you rephrase it? It is rather broad.

By Mr. Lublin:

Q. O.K. Any information pertaining to drugs being on the premises or being sold by Mom Santana within one month of this arrest?

The Court. Now, I wonder if I could just hesitate a moment. We have to be careful of the premises we are speaking of. Is it 2511 North Fifth or is it Sixth and Glenwood? I assume they are different.

Mr. Lublin. Yes, sir. Any premises.

The Court. 2311 North Fifth or Sixth and Glenwood, and I assume they are different.

The Witness. They are.

By Mr. Lublin:

Q. Any premises in which Mom Santana also known as Dominga Santana lived or worked or—in quotes—allegedly
54 conducted sales or possession of heroin.

Mr. McBride. I object to that, sir. I don't think that where she worked has any relevance and I don't think the Sixth and Glenwood property has any relevance here.

The Court. Well, here is an issue here. This was a warrantless arrest; is that correct?

Mr. McBride. That's correct, yes, sir.

The Court. So there is an issue of probable cause to arrest the defendant, Santana.

Am I correct there, I assume for this record that Mom Santana is the same as the defendant named in the indictment or is this a different person?

The WITNESS. No, the same person.

Mr. LUBLIN. He had testified that she has been called Mom Santana and that is referring to Dominga Santana, the defendant here today.

The COURT. All right. Well, then, if that's so, I think the question is proper, Mr. McBride, because among several elements I have to consider, one important one is a clear showing of probable cause, and I would permit that.

You may answer, Officer Gilletti.

Objection overruled.

Repeat the question.

A. And the question is what, sir? I heard——

The COURT. What was the question?

55 By Mr. LUBLIN:

Q. What information did you receive within one month of this arrest pertaining to Dominga Santana?

A. I still—specifically I can't tell you what information. I received information that Mom Santana, who is the defendant, who I have seen through photographs, was dealing in heroin at the location of Sixth and Glenwood up until this date here or two days prior to this arrest.

Q. From who did you receive this within one month?

A. A confidential police informant and I can't recall exactly when.

Q. One confidential police informant?

A. During that one month period?

Q. Yes.

A. I really can't say, sir. It might have been three. It might have been ten. I don't recall.

Q. Do you recall any of the confidential informants at all during that one-month period?

A. Yes, sir.

Q. O.K. This one confidential informant whose name I won't ask you, has this informant testified in court?

A. No, sir, he hasn't.

Q. Has information from this informant led to the arrest of any other people?

A. One particular informant, it did, yes, sir.

56 Q. O.K. Did this pertain to drugs?

A. Yes, it did.

Q. And this informant told you that an individual was either selling or dealing or had possession of drugs and you in fact did discover that this information was true; is that correct?

A. I still can't get what you are getting at. I discovered on August 16 that it was certainly true, yes, sir. Until then I did not.

Q. Pardon me? Did you finish? What did you say then?

A. Until then I did not personally discover that she was dealing in drugs. That's the first purchase I made.

Q. We are talking now about this informant and testimony prior to this matter dealing with either Mrs. Santana or anyone else where this informant gave you information which proved to be true. Did that in fact occur?

A. Counselor, I really can't understand what the question is. There was no informant. When you keep speaking—there was no informant in this case.

Q. There was no informant?

A. Not with this—August 16, no, sir, there wasn't. I know what you are asking me, Counselor. Now, you are talking about something that may have happened or just happened at another time.

Q. Try and listen to the question if you will, please,

57 Officer. Prior to this time you testified that you received numerous complaints from numerous confidential informants pertaining to Dominga Santana also known as Mom Santana; isn't that correct?

A. That's correct, right.

Q. O.K. Now, do you remember not specifically the name, or if you do remember the name, fine, I am not asking for the name, do you remember any of these confidential informants?

A. Yes, sir.

Q. O.K. Now, not pertaining to this case, did that confidential informant give you information which led to the arrest of any other person at any other time prior to this arrest?

A. The last informant, no, sir. I stated that earlier. It had no—that was the first contact I had with that one particular informant.

The COURT. How about any other informants?

The WITNESS. The other ones have led to arrests, yes, for narcotics and for sales.

By Mr. LUBLIN:

Q. And their information, those other informants, had been correct; is that not right?

A. That is correct.

Q. And to the best of your knowledge did the information that these other confidential informants gave lead to convictions?

A. The most recent——

Q. Strike that. Strike the question, please.

58 Did their informaton prove to be true?

A. I stated it did, yes, sir.

Q. O.K. Now, we are talking about other cases and other people than the informants that we discussed earlier. Do you understand that?

A. I understand what you are talking about, something altogether different.

Q. Fine. On August 16, 1974, after you signaled to the other officers, what did you do? This is at the very end after you had arrested Patricia McCafferty.

A. Well, after the signal, I told them what was going on and everything. I went back to my unit.

Q. So then I take it you weren't present when the actual entry was made?

A. No, sir, I did not return to the address.

Q. O.K. And you didn't see the entry or anything like that; is that correct?

A. No, I did not.

Q. O.K. Now, what time was it when you left the area?

A. I made that purchase just about 7:30 P.M., maybe 7:31. According to my watch it was 7:30 when I told Sergeant Pruitt that the buy went down and I showed him the bundle of dope.

Q. Now, earlier when you had spoken to Patricia McCafferty on the telephone and you arranged to meet her at Mom Santana's——

A. No, sir.

59 Pardon me?

A. I did not arrange to meet her at Mom Santana's.

Q. She arranged——

A. No, sir. She told me to pick her up at Fifth and Ashdale Streets.

Q. Oh, then she would take you?

A. That's correct.

Q. To Mom Santana's? I am sorry. You are absolutely right.

Who suggested the time that you would meet, yourself or Patricia McCafferty?

A. She told—Mrs. McCafferty told me, "All right, pick me up in a short time," you know, which she said on other occasions before, "Ten or fifteen minutes." In other words, she was going to leave her house and walk up to the corner.

Mr. LUBLIN O.K. I have nothing further.

The COURT. Mr. Eisman, do you have a few more questions?

Mr. EISMAN. Yes, I do.

By Mr. EISMAN:

Q. You testified before that you had no plan with Sergeant Pruitt as to what would happen if in fact you did make this buy from McCafferty?

A. No, sir, I testified that I didn't take part in any plan that was made. I said Sergeant Pruitt handled that. I knew—I was well aware of the fact that there was going to be a buy

60 bust because I told him I wanted a buy bust.

Q. O.K. Well, in your report you say, "Sergeant Pruitt then advised me that he will take a team with him to back me up with the buy and if the buy goes down that I should inform him of the purchase immediately and that he and the team will retrieve the pre-recorded money."

Now, is that true?

A. That's correct. That's exactly what I just said, Counselor.

Q. So there was a plan which Sergeant Pruitt advised you of that he would take; is that correct?

A. Per se, I told him what—about the buy and he has got the——

Q. You also stated in this report prior to that, "I told Sergeant Pruitt that we were going to Dominga Santana's house at 2311 North Fifth Street to purchase a bundle of heroin." Isn't that correct?

A. That's correct.

Q. Now, how did you know that there would be drugs at Mom Santana's house?

A. I did not know except for the fact that Mrs. McCafferty said that that's where we may be going. I didn't know. I didn't say we were going there. I said we may be going to that location.

Q. Isn't it a fact that McCafferty said that she would take you to Mom Santana's house?

A. That's a fact.

Q. And that the purpose for going there was to buy drugs and that she has good dope and it will cost $115?

61 A. That's correct.

Q. And what time did you meet McCafferty?

A. I am not sure. I believe it was around 7:00 P.M., a short time after the conversation.

Q. The report says 7:15 P.M. Would that be correct?

A. It is possible. It was around 7 or 7:15; I am not sure.

Q. Now, McCafferty told you that she knew that Mom Santana had good dope and it will cost you $115; isn't that correct?

A. She told me that, yes, sir, on other occasions, too.

Q. You have made two prior purchases from her; is that correct?

A. From Mrs. McCafferty?

Q. Yes.

A. Yes, sir.

Q. You stated in this report that, "McCafferty got out of my auto and I observed her walk into 2311 North Fifth Street which is the known residence of Dominga Santana to me because I was at this location with an informant just two days prior to this incident." Now, is that correct?

A. That's correct.

Q. And she returned five minutes later; is that correct?

A. Yes, sir.

Q. And then after that you drove away and told her she was under arrest; is that right?

A. That's correct.

Q. What time was that?

62 A. Approximately 7:30 P.M.

Q. 7:30?

A. 7:30 or 7:31, in the area.

Q. Now, at the time you had units watching the house; is that correct?

A. At the time that Miss McCafferty left my auto?

Q. Yes.

A. Yes, sir.

Q. And how many policemen were involved in that surveillance?

A. Well, I was being trailed by several automobiles. To my knowledge there were three that were also in sight of the house and of my car and of Mrs. McCafferty, Sergeant Pruitt, Officer Morse and Officer Strohm.

Q. And they were all watching the house; is that right?

A. To the best of my knowledge there were.

Mr. EISMAN. I have nothing further.

Mr. LUBLIN. I just have two questions, Your Honor. It will be pretty much rapid fire.

By Mr. LUBLIN:

Q. Did you state in response to Mr. Eisman's question that Patricia McCafferty had told you many times before that Mom Santana had good dope?

A. I think I did, yes, sir.

Q. O.K. Now, would it be fair to say that from the time you picked up Patricia McCafferty to the time of her arrest

63 took approximately 10 minutes at most?

A. From the time I met her at Fifth and Ashdale?

Q. Yes.

A. Until the time we placed her under arrest? Fifteen minutes perhaps.

Q. Top 15 minutes?

A. Well, I am estimating. I am not certain. Probably within—according to the report, it was 15 minutes.

Q. Exactly. Is the report correct?

A. I am not certain word for word. That portion is——

Q. Did you pick her up at 7:15?

A. I am not certain I picked her up at 7:15.

The COURT. Wait. One at a time.

By Mr. LUBLIN:

Q. O.K. Are you certain the arrest was at 7:30 or 7:31?

A. That I am certain of because I even looked at the watch.

Q. And to the best of your knowledge it couldn't have taken more than 15 minutes, could it?

A. I am not certain.

The COURT. Is that approximately correct?

The WITNESS. Yes, sir.

The COURT. Did it take an hour?

The WITNESS. Oh, yes, definitely.

The COURT. Did the transaction take an hour from the time you picked her up until she was arrested?

64 The WITNESS. Oh, no, it was definitely within 20, 25-minute period.

The COURT. All right.

The WITNESS. There it says 16 minutes but it could have been 20 minutes.

By Mr. LUBLIN:

Q. Within 20 minutes?

A. I said 20, 25, a half an hour. It was no longer than that, though.

The COURT. Mr. McBride?

Oh.

By Mr. LUBLIN:

Q. Could it have been less than 10 minutes?

Mr. MCBRIDE. I object, sir. He has answered the question.

The COURT. He has answered it. I think so.

Mr. LUBLIN. No further questions.

The COURT. Well, could it have been less than 10 minutes?

The WITNESS. No, sir, I don't think.

The COURT. Could it have been eight minutes or nine minutes?

The WITNESS. No, sir.

The COURT. All right, Mr. McBride.

Mr. MCBRIDE. Nothing further.

65 The COURT. All right. You may step down, Officer Gilletti.

The WITNESS. All right.

The COURT. Oh, that took place in August; is that correct?

The WITNESS. Yes, Your Honor.

The COURT. All right. Was Mrs. McCafferty armed?

The WITNESS. No, she wasn't.

The COURT. All right. And you shouldn't discuss your testimony with any other witness, Officer.

The WITNESS. Yes, sir.

The COURT. All right, would you step up here on the witness chair, please?

[TESTIMONY OF OFFICER RICHARD STROHM]

RICHARD STROHM, sworn.

DIRECT EXAMINATION

By Mr. MCBRIDE:

Q. In case you want them (hands file to witness). Officer Strohm, by whom are you employed?

A. Philadelphia Police Department.

Q. How long have you been employed by them?

A. Seven and a half years.

Q. What is your present assignment?

A. Philadelphia Narcotics Unit plainclothes undercover capacity.

Q. How long have you worked in that capacity?

66 A. Over three years.

Q. Were you working in that capacity on August 16, 1974?

A. I was.

Q. Did you have occasion on that date to take part in an investigation concerning Dominga Santana and the defendant, William Alejandro?

A. I did.

Q. All right. Would you relate, please, to the court what part you took in that investigation?

A. Yes. On August 16, 1974 at approximately 7:25 P.M., myself along with Sergeant Pruitt, Badge No. 8549, Narcotics Unit, Officer Thomas Taggart, Badge No. 7322 in the Narcotics Unit, we were assigned on a surveillance point in the 2500 block of North Fifth Street to watch the defendant, Santana's house which was 2511 North Fifth.

At approximately 7:25 P.M. we observed Officer Gilletti park his private vehicle on Dauphin Street just west of Fifth. Another defendant, Patricia McCafferty, who is not present in the

courtroom at this time, got out of his vehicle and went into—walked cater-corner across Fifth Street to 2511 North Fifth Street. I observed the subject, McCafferty, tap the heads of little children that were on the street and the defendant, Mr. Alejandro sitting over there at defense table with his head tilted, he was standing on the steps and it appeared they had a brief conversation and McCafferty and Alejandro went
67 into the house, 2511 North Fifth Street.

At approximately 7:30 P.M., August 16, the defendant, Alejandro, came out the front door, looked both ways, north and south on Fifth Street, and then Patricia McCafferty emerged. She walked back to Fifth and Dauphin Streets and disappeared west of Fifth Street.

In a matter of seconds later, Officer Gilletti came north on Fifth Street in his private auto with the defendant, McCafferty. He passed our vehicle, gave us a hand signal with his left hand out his window, that he had made a purchase of narcotics.

Officer Gilletti then parked his vehicle in the 2700 block of North Fifth Street. Myself, Officer Taggart, Sergeant Pruitt, stopped in back of Officer Gilletti's car.

I might add that Officer Jumper, Badge No. 2415 in the Narcotics Unit, was also in our vehicle. And at this point Officer Jumper and myself left our van and approached Officer Gilletti's car.

Officer Gilletti had identified himself to the subject, McCafferty, and placed her under arrest.

Officer Jumper got into his vehicle—that is, Officer Gilletti's vehicle--next to McCafferty, and Officer Gilletti and the subject, McCafferty, relayed to me that Ma Santana—"Ma" is a nickname of Dominga Santana sitting next to Mr. Eisman there—that she had the money which the serial numbers were pre-recorded by Officer Gilletti.

68 At this time Sergeant Pruitt, myself, and Taggart returned to 2511 North Fifth Street.

We stopped the van. I got out of the side of the van and my badge and I.D. card in my left hand. The subject, Dominga Santana, was standing in the doorway. At this time the females—there was numerous females outside, sitting around the steps of 2511 and 2509 North Fifth Street—started hollering,

and the defendant, Santana, I also observed in her right hand a brown paper bag. She turned and walked back towards the house.

At this time I ran through the front door which was wide open and I grabbed the defendant, Santana, in the vestibule just at the dining area, and she turned hard right to go into the living room, I guess turning right itself off of the dining room, and I grabbed her by the right hand and told her she was under arrest. She kept pulling with her right hand in which she had the paper bag, and as she did, the bag tilted and two bundles of glazed paper packets with a white powder fell to the floor. I held on to the rest of the bag and the defendant, Alejandro sitting there, grabbed the two bundles that fell to the floor. He picked them up and started—appeared to me to be running or fast moving. I wasn't paying too much attention to him. I was more or less concerned with the defendant, Santana.

At this time Officer Morse lunged for him and had to subdue him. After he was subdued the defendant, Santana—or, correction—the defendant, Alejandro sitting over there,
69 dropped the two bundles back to the floor. Officer Morse picked up these two bundles, gave them back to me, and put them back in the brown paper bag.

Sergeant Pruitt secured the premises, had the defendant, Santana, empty out, I believe—empty out her pockets. Sergeant Pruitt would have to testify to that. That would be—I can't testify to that, what she had on her own. Anyway, she was warned of her rights, if she knew her constitutional rights, and she said, "Yeah, yeah." Nobody said anything to her. And she was placed under arrest.

And the defendant, Alejandro, was sent to the hospital with a head wound, I believe three stitches, I believe, to close the laceration on the top of his head. The uniformed took him to the hospital and then brought him to the Narcotics Unit.

Now, the brown paper bag which I confiscated out of the defendant's hand contained respectively 15 bundles of white powder in glazed paper packets totaling 241 bags of 10 bundles and five bundles. There was 118 bags.

I initialed most of the front and I believe—well, some of the packets in each bundle, I initialed "RTS" which are my initials

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and the amounts of each bundle. Some 24, 24, 23 packets and different bundles and also the date, 8–16–74, and these items were placed under the property receipt No. 543957 and submitted to the chemical lab.

70 Mr. McBride. Cross examine.

The Court. Mr. Lublin?

Mr. Lublin. Yes.

CROSS EXAMINATION

By Mr. Lublin:

Q. Officer Strohm, taking you to the point where you first say you saw the defendant, Alejandro, what did he do? Where did he come from?

A. Defendant Alejandro, I observed him in the dining area of 2511.

Q. The first time you saw him that day?

A. Oh, the first time I saw that defendant, Alejandro, that day, he was standing on the steps of 2511 North Fifth Street.

Q. And you did not see him exit from that property, is that correct, prior to that?

Q. You saw him enter thereafter, though; is that correct?

A. I never—he was on the premises. He was on the top step of 2511.

Q. Did you ever see him go back into the house?

A. Yes, sir, he did.

Q. Were you part of the back-up team to Officer Gilletti?

A. Yes, sir.

Q. Did you follow Officer Gilletti's car to Fifth and

71 Ashland?

A. Yes, sir.

Q. Approximately what time did you arrive at Fifth and Ashland?

A. In the area of 7, 7:10 P.M.

Mr. Lublin. No further questions.

The Court. Mr. Eisman?

By Mr. Eisman:

Q. You said that McCafferty said to you while she was in the car that Ma Santana had the money. Is that the statement that was made to you?

A. That's correct.

Q. You hadn't seen Ma Santana all that day, had you?

A. No, sir.

Q. You didn't see her outside the house at all, then; is that right?

A. That's correct.

Q. And when you ran up to the door, she was standing inside the house, inside the vestibule, in the doorway; is that right?

A. Visible from the Street level, that's correct.

Q. What?

A. Visible at street level.

Q. Right. But she was inside the doorway, is that right? That's what you testified to.

A. That's correct.

The Court. How far inside the doorway?

The Witness. Directly—just—the doorway, itself.

72 Your Honor, like if—she would be standing under the—be in the door. One step, she would be out; one step she would be inside the vestibule.

By Mr. Eisman:

Q. The threshold, would you say?

A. That's correct, sir.

Q. Where was Alejandro?

A. He was still inside.

Q. You had no information as to what was in that bag when you ran up the steps; is that right?

A. That's correct.

Q. And as you ran up the steps, she started backing into the house; is that right?

A. That's correct.

Q. And you went in after her?

A. That's correct.

Q. And you grabbed her arm and the bag opened up; is that what happened?

A. I grabbed her hand and a short struggle—she kept pulling—and then two bundles of heroin, alleged heroin, fell to the floor.

Mr. Eisman. I see. I have no other questions at this time.

The Court. Mr. Lublin?

Mr. Lublin. Nothing.

The Court. Mr. McBride?

73 Mr. McBride. Nothing further.

The Court. Oh, Officer, when you went into the house, who else was in the house other than the two defendants?

The Witness. That is all, Your Honor.

The Court. And other than yourself, what other police officers then went into the house?

The Witness. Sergeant Pruitt and Officer Morse. Let me see, that was at the immediate entry, and after the house was secured, I believe maybe another officer or two came in.

The Court. All right. Now, which of those officers were uniformed?

The Witness. That's right.

The Court. All right.

The Witness. Sergeant Pruitt or Officer Morse were plainclothesmen.

The Court. All right. Did you have your weapons ready for use?

The Witness. Yes, sir.

The Court. In your hand?

The Witness. I had mine in my hand, sir.

The Court. When you went in the door?

The Witness. Yes, sir.

The Court. Would it be visible to a person standing in the doorway?

The Witness. Yes, sir, it would.

74 The Court. And had you ever seen either of the defendants before?

The Witness. Yes, sir, I have.

The Court. And did you recognize them as Ma Santana, as you have described, or Mr. Alejandro, as you have described here?

The Witness. Just Ma Santana, Your Honor. I didn't——

The Court. You had never seen Mr. Alejandro before that day?

The Witness. That's correct, sir.

The Court. That's the first time you saw him?

The Witness. That is correct, sir.

The Court. Tell us again when you saw Defendant Santana standing in the door frame, what is it that you saw that she had in her hand?

The Witness. She had a brown paper bag in her right hand.

The Court. Give us some idea of the size of it? Was it the kind you get in a supermarket or the kind you get, a very small bag, that will hold a pack of cigarettes or something? What kind of bag was it?

The Witness. It would hold a quart of soda and it would be like a lunch bag, Your Honor, small, approximately 10 inches high, maybe four or five inches wide.

The Court. Now, you said you also heard voices. When was it that you heard some shouts or voices after you first

75 saw——

The Witness. As we got out of the van, Your Honor, the females outside—Ma Santana looked at us. I emerged from the van with my badge and I.D. card in my hand. The other people there started hollering.

The Court. How far away were you at that time to where either of the defendants were standing?

The Witness. I would say 15 feet, Your Honor.

The Court. And you mentioned a van. Is that an unmarked or a marked police van?

The Witness. Unmarked private vehicle.

The Court. Oh, it is an automobile?

The Witness. No, it is a van. It is privately owned.

The Court. I see. And did you say anything when you emerged with your badge and your credentials displayed?

The Witness. Yes, sir, "Police."

The Court. And did you say that before or after you heard the shouting?

The Witness. As I was getting out of the van, and the shouting, I guess it was simultaneously, Your Honor.

The Court. All right. Did you encounter anyone from that time, from the time you touched either of the defendants?

The Witness. No, sir. The girls that were standing outside just moved aside.

76 The Court. Was there any resistance of any kind other than the resistance you have described in respect to the defendant, Santana?

The WITNESS. No, sir, there wasn't.

The COURT. And the resistance that you observed in regard to the defendant, Alejandro?

The WITNESS. No, sir, there wasn't.

The COURT. All right. They are the only questions that I have. You may step down.

The WITNESS. Thank you.

Mr. LUBLIN. Wait. Could I just see the report again?

The COURT. Mr. Lublin may have another question.

By Mr. LUBLIN:

Q. When you looked from the street and you testified you held your badge up, Dominga Santana was in the vestibule; is that correct?

A. She was in the threshold.

Q. O.K. Now, while you were entering, did she do anything?

A. Pardon me, sir?

Q. Did she do anything, make any movement, do anything while you were entering, going up the steps into the house?

A. Yes, she was going back through the house toward the rear.

Q. Was that before you entered or after you entered?

A. Both.

Q. Did you state to Policeman Gilletti or Officer Pruitt that once you were inside this residence you observed Do-
77 minga Santana running from the vestibule towards the living room carrying a brown paper bag?

A. Not in those exact words.

Q. So that if those words were part of the 49 report they would be incorrect; is that correct?

A. The exact terminology, yes, sir, but basically, it is a summary.

Q. Pardon me?

A. I would say basically that would be a summary.

Q. Well, then, the summary would be incorrect; is that what you are telling us?

A. No, sir, the summary wouldn't be incorrect.

Q. Well, then, was it just when you got once inside the premises that you saw her running or was it prior to that time?

A. Both, sir. She turned around as I exited the van. As I entered the vestibule, she was entering the dining area.

Q. So that if the 49 report didn't have any information as to her moving prior to entering, it would be deficient; is that correct?

A. I would have to see it, sir. I don't know what is in there.

Mr. LUBLIN. With the court's permission——

The COURT. Yes. Whether it is deficient or not is another question. You can ask him if he agrees with that version of it. Whether it is deficient or not is the court's conclusion.

A. Where is that?

78 (Discussion off the record between Mr. Lublin and the witness.)

By Mr. LUBLIN:

Q. That is what the report says, is it not?

A. That's correct, sir, but there is a few thousand vowels left out. Basically that is correct.

Mr. LUBLIN. No further questions.

The COURT. Mr. McBride?

Mr. McBRIDE. I have nothing further.

The COURT. All right. I just have one more I forgot to mention. After you received your hand signal from Officer Gilletti, that was a pre-arranged signal of some kind?

The WITNESS. That's correct, sir.

The COURT. And that signal meant to you and your partners that the transaction had been completed?

The WITNESS. That's correct, sir.

The COURT. Now, then, you visited Gilletti's car and after that you left to go to the building where the defendant, Santana, was reported to be; is that correct?

The WITNESS. That's correct, sir.

The COURT. Now, at that minute when you left, what was your purpose in going to that house? What did you intend to do?

The WITNESS. I immediately intended to recover the marked money which was used in the transaction and to arrest
79 the defendant, Dominga Santana.

The COURT. All right. That's all. You may step down.

The WITNESS. Thank you, sir.

The COURT. All right, Mr. McBride.

Mr. McBride Would you ask Sergeant Pruitt to come in, please.

The Court. All right, would you step up here, Sergeant Pruitt, please.

[Testimony of Sergeant Harold Pruitt]

Harold Pruitt, sworn.

DIRECT EXAMINATION

By Mr. McBride:

Q. Sergeant Pruitt, how long have you been with the Philadelphia Narcotics Squad?

A. Two years and two months.

Q. And were you employed with them on August 16, 1974?

A. I was.

Q. Did you have occasion to take part in an investigation on that day concerning the defendant, Dominga Santana, and the defendant, William Alejandro?

A. I did.

Q. All right. Now, did there come a time in your investigation when you arrived at the premises 2311 North Fifth Street?

A. I did.

80 Q. O.K. Would you start there and relate to the court what happened when you arrived at 2311 North Fifth Street? Keep your voice up, please.

A. If Your Honor pleases, we arrived at that location. It was approximately 7:35 P.M. I got out of the bus directly behind Policeman Strohm and in the doorway in a vestibule between the front door and the inner door I saw the defendant. Dominga Santana. She—Policeman Strohm got out the of the bus and approached the door. He had his badge up and he hollered, "Police."

And Dominga Santana had a bag in her hand and she started inside the house.

I followed Policeman Strohm into the house and it was—we got into the dining room area of the house.

Officer Strohm recovered the bag. He grabbed the bag out of her hand. We had gone there to retrieve money that had been used in the purchase of narcotics.

As he grabbed the bag, something fell out of the bag. It appeared to be narcotics.

Officer Morse had come in the door behind me and a struggle ensued between myself, Dominga Santana, and Officer Strohm, and a struggle between Officer Morse and the defendant sitting to the right here.

Q. Alejandro?

A. Alejandro, right.

81 After the defendants were subdued I took Dominga Santana into the kitchen area and told her to empty her pockets on the table. This was after Officer Strohm had told her she was under arrest.

She emptied the contents of her rear pocket, pants pocket, out and it contained approximately $135 in U.S. currency.

I took a card from my pocket which had been given to me by Policeman Gilletti prior to leaving the narcotics units and it had serial numbers of bills recorded on it.

Q. All right. Excuse me just a minute.

The Court. See if Officer Gilletti has D–1.

The Witness. Here it is.

By Mr. McBride:

Q. All right. We will get the actual one.

All right. So continue with what you did. You took the card?

A. I took the bills that she had taken from her rear pocket, right pocket, and I compared them, serial numbers of these bills against the serial numbers of the bills that had been recorded on the card.

Q. I see. And where did you get those bills?

A. From her right rear pants pocket.

Q. That's the defendant, Santana's?

A. That is correct.

Q. All right.

82 A. I located three $20 bills, Serial No. E. 18967047 A—Andy; Serial No. E 80681160 B—Barney; Serial No. F—Frank—085328698 Andy. These were all of $20 denominations.

There was one $10 bill. Serial No. D—Dan—16594003 B—Barney.

These bills were part of the money that had been recorded prior to leaving the Narcotics Unit by Officer Gilletti.

Q. Is that the money that Officer Gilletti used in making the buy from Patricia McCafferty?

A. Yes.

Mr. McBride. Would you mark this Government's Exhibit G–1, please.

(Photostatic copy of money was marked Exhibit G–1 for identification.)

By Mr. McBride:

Q. Sergeant Pruitt, let me show you what has been marked G–1.

Would the court care to see this?

The Court. No.

By Mr. McBride:

Q. And would you identify this?

A. Those are the bills that were taken. They have Officer Gilletti's initials on the forehead of the pictures on the bills.

Q. O.K. Well, they are not the actual bills, are they?

A. They are not; they are photostatic copies.

Q. O.K. Now, I will show you what has been marked D–1 and see if you can identify it. Would you identify that, please?

83 A. Yes, that's the card that was given to me by Policeman Gilletti, and when I arrived back in the Narcotics Headquarters, this was recorded on the back of it.

Q. All right. What did you do after that, Sergeant Pruitt?

A. The defendants were then transported—well, Dominga Santana was warned of her rights but she had a problem of understanding the English language. There was another female inside the location that had come in after we had come into the location who was a relative and I advised her that I was trying to explain her rights to her.

The other defendant, the gentleman sitting to the right——

The Court. Alejandro.

The Witness.—Alejandro—was transported to the hospital by police wagon for stitches in the head.

Mr. McBride. O.K. I have no further questions.

If it please the court, I believe that Sergeant Pruitt's testimoney would have been repetitious. In the beginning I started

him out at 2311. I have no objection if defense counsel want to cross examine him as to other events.

The Court. All right, Mr. Lublin.

CROSS EXAMINATION

By Mr. Lublin:

Q. Yes, just briefly.

84 Did you lease the van the same time that Strohm did?

A. Immediately afterwards.

Mr. Lublin. No further questions.

The Court. Mr. Eisman?

By Mr. Eisman:

Q. As far as the layout of the house you testified there were two doors, a front door and then a door in the vestibule; is that right?

A. It is a vestibule. As you go into the house, there is a hallway. A door to the right would go into the—one would go into the living room and one would go into the dining room.

Q. You say you initially saw her standing inside the vestibule?

A. Well, she was standing right in the doorway. The vestibule is when you step up on the top step. You go—you are practically in the vestibule then.

Q. Is that where she was?

A. When I first saw her? Yes.

Q. And the door was open or closed?

A. It was open.

Q. Was the inside door open or closed?

A. Pardon me?

Q. Was the inside door open or closed?

A. When I got inside I couldn't tell from the angle whether the inside door was open or closed, but it was open when

85 I went through the door

Q. O.K. Now, you were in this from the beginning, is that right, what you testified to; is that right?

A. That's correct.

Q. And you were told back at the narcotics headquarters that Gilletti was going to this house to try to get a buy; is that right?

A. No.

Q. What were you told?
A. I wasn't told directly that he was going to get a buy.
Q. What were you told?
A. What was I told?
Q. Yes.
A. Officer Gilletti had told me that he had a 25 bag or one bundle of heroin purchase that he was going to purchase and that McCafferty was going to take him possibly to a new location where Dominga Santana had moved to.
Q. Did he give you the address?
A. Yes, he did.
Q. And that's where the buy was supposed to take place according to McCafferty?
A. Not necessarily. It was—the problem was that we weren't sure the buy was going there, so I didn't disperse my men. I only sent two men down into that area to put up a surveillance. The other five men I put as a tail on Officer Gilletti. We were——

86 Q. How many men altogether did you have?
A. We had nine.

Q. Nine?
A. Counting myself.
Q. Now, when did you first learn that McCafferty had made a buy at this location?
A. I saw McCafferty go to that location and meet with Alejandro and go into the house and come out. Alejandro came out of the house and then McCafferty came out of the house and went back to the area where Gilletti had his car parked.
He immediately pulled around the corner, north on Fifth Street. About a block and a half, we pulled beside Gilletti and he said the buy had gone down. He gave us a pre-arranged signal that the buy had gone down by waving his arm. He said the buy had gone down, that Momma had—that Momma Santana had the money. He showed us the narcotics.
We immediately returned to that area and met with Officer Morse who had the house under observation.
Q. And that was the only information you were given by Officer Gilletti, is that right, at that time?

A. That the buy had gone down, that he had the drugs. He had showed us the drugs and that Momma Santana had the money.
Mr. EISMAN. I have no other questions.
The COURT. Mr. McBride, any additional questions?
Mr. McBRIDE. No, sir.

87 The COURT. Sergeant Pruitt, were you in charge of the group?
The WITNESS. I was, Your Honor.
The COURT. And was this house a typical row house?
The WITNESS. It was, Your Honor.
The COURT. And that means it had one front door?
The WITNESS. Yes, Your Honor.
The COURT. And was there a rear door also?
The WITNESS. There was, Your Honor.
The COURT. Did you have any men stationed at the rear?
The WITNESS. No, I didn't.
The COURT. Would that ordinarily be something you would do under those circumstances?
The WITNESS. Under the circumstances if I could have got a man back there without being detected I certainly would have.
The COURT. I see. And that's the reason why you didn't do that; is that correct?
The WITNESS. That is correct.
The COURT. Did you consider after you had come to the front of the premises and had seen Defendant Santana in the doorway, did you consider before exiting the van securing an arrest warrant from a magistrate or other judicial officer?
The WITNESS. There wasn't time, Your Honor.

88 The COURT. Could you explain the basis upon which you concluded at that juncture that there was not time?
The WITNESS. Are you referring to the search warrant, sir?
The COURT. Well, either one, the search or an arrest warrant.
The WITNESS. There wasn't time for the search warrant because he had to meet McCafferty at 7:15 at her home and at the time that I received the message was between 6:40 and 6:45. That gave us less than 30 minutes to type up a search warrant and get it signed and again the main reason that I didn't do it was the fact that I wasn't sure we were going to that location.

The COURT. All right. Now, at the time you went to the location, after having received the pre-arranged signal from Officer Gilletti, I understand that Defendant Santana had possession of the marked money; is that correct?

The WITNESS. That is correct, Your Honor.

The COURT. What was your purpose in going to the premises at that time? What were you going to do when you got there?

The WITNESS. To recover the money that was used in the purchase of that heroin.

The COURT. Were you going to effectuate an arrest of any kind?

The WITNESS. Yes, I was, Your Honor.

89 The COURT. Had you given consideration to securing an arrest warrant based upon Officer Gilletti's information?

The WITNESS. There wasn't time again, Your Honor.

The COURT. All right. Would you explain for the record again the basis upon which you concluded as the officer in charge that there was not sufficient time?

The WITNESS. The reason that we went immediately was to recover the money which was part of the evidence in this case, and had we waited an hour, the money may not have been in that house at that time or it might not have been on the person of Dominga Santana.

The COURT. All right. Now, was the house furnished?

The WITNESS. Yes, it was, Your Honor.

The COURT. And did it appear as though someone lived there?

The WITNESS. Yes, Your Honor.

The COURT. And did you learn at that time or at a later time who actually did live there?

The WITNESS. Yes, Your Honor.

The COURT. And who was that person?

The WITNESS. Dominga Santana.

The COURT. And when did you first learn that?

The WITNESS. Inside the residence we found papers with her name and address on it.

The COURT. All right. Were there any weapons found

90 in connection with this episode?

The WITNESS. Yes, Your Honor.

The COURT. Other than obviously the police weapons?

The WITNESS. Yes, sir.

The COURT. Any other weapons?

The WITNESS. There were. There was a meat cleaver and a large butcher knife on the dining room table and there was one or two butcher knives on the kitchen table.

The COURT. Were they ever used as weapons or did you believe that they might be used as weapons?

The WITNESS. There was a strong possibility they could have been grabbed by one of the defendants.

The COURT. All right. They are the only questions that I have.

Mr. MCBRIDE. I have one other question.

REDIRECT EXAMINATION

By Mr. MCBRIDE:

Q. Sergeant Pruitt, was all of the money that was marked recovered?

A. No, it was not.

Q. So that some of the money, even after you hit the house, had disappeared somewhere?

A. That is correct, $40.

Mr. MCBRIDE. Thank you.

91 The COURT. How many bills was that, do you know?

The WITNESS. Yes, sir.

The COURT. Were they all 1's?

The WITNESS. No, Your Honor. There was five $20 and one $10. We recovered three $20 bills and one $10. Two $20 bills were still missing.

The COURT. Mrs. McCafferty didn't have that?

The WITNESS. No, Your Honor.

The COURT. That was never recovered?

The WITNESS. No, Your Honor.

The COURT. All right. Any additional questions of the witness?

Mr. LUBLIN. Yes, sir.

RECROSS EXAMINATION

By Mr. LUBLIN:

Q. How many men did you say took part in this?

A. Nine men.

Q. What prevented you from sending one of those nine or another individual to get a warrant?

A. What would——?

Mr. McBride. Excuse me, what prevented that?

The Court. What prevented him from sending one of those men to get an arrest warrant, is that what you meant, or a search warrant?

92 Mr. Lublin. Exactly.

The Witness. What kind?

The Court. Either one. Let's start with the search warrant.

Mr. McBride. I would object to that. I think he has answered that in response to Your Honor's question.

The Court. I will permit counsel to frame the questions maybe in a more appropriate way than the court did. Objection overruled.

You may answer it. If necessary, answer it again, but you have to answer it again, Officer.

The Witness. The time element.

By Mr. Lublin:

Q. You had no other men there in narcotics; is that correct?

A. I had no other men at narcotics?

Q. Is that correct, when you first received this phone call?

The Court. Now, you mean at 6:40 P.M. as he testified?

Mr. Lublin. Yes.

The Court. We are talking about before this caper began.

Mr. McBride. I would object to that question, sir. How can the sergeant get a search warrant before anything has happened on which to base the probable cause? That question doesn't make any sense.

93 Mr. Lublin. Do you wish me to respond to that, Your Honor?

The Court. No, I want the witness to respond.

A. If I wasn't going to the location I would not need a search warrant. Had I known for sure I was going to that location then I would have dispersed my men all around to that location then and I would not have sent—I would only have sent one car to tail the people. As it was, I took the largest portion of my men and we followed Officer Gilletti.

By Mr. Lublin:

Q. Isn't it a fact that Sergeant Pruitt told you——

A. I am Sergeant Pruitt.

Q. Excuse me—Policeman Gilletti told you that he and McCafferty were going to Dominga Santana's house, 2311 North Fifth Street, to purchase a bundle of heroin; isn't that a fact?

A. That's—he told me.

Q. Yes or no, is it or is it not a fact?

The Court. Mr. Lublin, let's not badger the witness.

Mr. Lublin. Your Honor, it calls for a yes or no answer.

The Court. All right, but don't argue with him.

Can you answer that yes or no?

The Witness. No, I can't, Your Honor.

The Court. He can't, your Honor.

94 Give us the best answer you can.

A. He told me that he thought that's where the buy was going to go down.

By Mr. Lublin:

Q. Did he give you the basis of why he thought this to be true?

A. Because the defendant, McCafferty, said that she was going to try to cop a bundle from Dominga Santana.

Q. Did he tell you that she said she was going to try to cop a bundle or that she was going to cop a bundle? This is as Gilletti gave it to you, to the best of your recollection.

A. She was going—to the best of my recollection—that she was going to try to cop a bundle from Dominga Santana.

Q. And, as a matter of fact, didn't he tell you that she told him the exact address where she was going to, that being the Fifth Street address?

A. She—he told me that, "We may go to 2511 North Fifth Street."

Q. So then you knew the exact address? Now, isn't it also a fact, Sergeant, that prior to this time you had received numerous complaints about Dominga Santana?

A. No, that is not correct.

Q. Are you telling the court today that you had no prior information about Dominga Santana?

A. No, I am not telling you that, either, I have not had numerous complaints.

95 Q. Did you have any complaints from anyone on any information from anyone pertaining to the sale or possession of heroin by Dominga Santana?

A. To the best of my knowledge Dominga Santana had been arrested for possession but as far as I know, as far as the complaints go, I was not aware that Dominga Santana lived on Fifth Street at the time. The last account I had, she lived around Sixth and Glenwood.

Q. Did you have any information prior to this arrest from any police informants or any other person that Dominga Santana was in the business of either possessing or selling dope?

A. Yes.

Q. From how many different sources did you have this information?

A. Officer Gilletti.

Q. That was the only source that you had; is that correct?

A. It has been—I imagine that other officers have mentioned it to me.

Q. Isn't it a fact that other officers have mentioned it to you, Sergeant?

A. It is possible, but not at that location.

Q. O.K. But at other locations, isn't that right? Now, isn't it a fact that you also knew at this time that McCafferty had on three other occasions made sales of heroin to your officers?

A. Yes, I knew that.

Q. So then you knew she had made the sales; isn't that a fact?

96 A. Yes.

Q. You knew of prior information pertaining to Dominga Santana; isn't that also a fact?

A. Prior to——?

Q. Prior to this incident?

A. That Dominga Santana had been involved with McCafferty? No, I didn't know that.

Q. You had no knowledge of that whatsoever?

A. Not until I was told by Policeman Gilletti.

Q. Well, did he tell you at that time or did he tell you later?

The Court. What time?

Mr. Lublin. Pardon me?

The Court. What time?

By Mr. Lublin:

Q. Right after the phone call?

A. Did he tell me what?

Q. That he had had information that Dominga Santana was dealing with drugs or the like.

A. I think he told me at that time.

Q. Then you did have that information at that time, isn't that right, that he had prior information from informants and other people that she had been dealing in drugs; isn't that correct?

A. No, not informants and other people. You keep harping on informants. I am talking about my police officers. I don't consider them my informants.

97 Q. Well, didn't your police officer, Offiier Gilletti, tell you that she was dealing in drugs?

A. Dominga Santana was dealing in drugs?

Q. That's correct, sir.

A. I believe he did.

Q. So you had information from your police officer that she was dealing in drugs. He now gave you the response to a phone call received by Pat McCafferty who had prior to this time made three sales to your officers; is that correct?

A. That's right.

Q. That a sale was going to go down at a certain address; isn't that correct?

A. That's not correct.

Q. That she was going to try to cop dope at this address?

A. That's correct.

Q. Right?

A. That's right.

Q. Which was the address of Dominga Santana; isn't that right?

A. Yes.

Q. O.K. Now, what prevented you from sending an individual other than those individuals that went on the street at that time to get a warrant?

A. I would have had to have probable cause, No. 1.

Q. So you determined that there was not enough probable cause; is that right?

98 A. I don't think it would have been.

Q. But you made that determination; is that correct?

A. That's right.

Mr. McBride. I object to that. I don't see what difference that makes.

The Court. Well, you made that judgment?

The Witness. Yes, Your Honor, I did.

The Court. All right. He made the judgment.

That's all right.

By Mr. Lublin:

Q. Now, you testified——

The Court. It has to go, Mr. McBride, to the reasonableness of the policeman's conduct. The court will have to determine if that was a reasonable judgment by this officer. It may have been wrong but it may have been reasonable.

Mr. McBride. Very good, sir.

The Court. It may have been correct. It may have been unreasonable.

By Mr. Lublin:

Q. Now, you testified as to two weapons which were in the house, two knives; is that correct?

A. Yes.

Q. O.K. Did you have any information whatsoever that those knives were there prior to your going into that home?

A. No, I didn't.

99 Q. Did you have any information or any reason to believe that Dominga Santana might have been armed?

A. I had no reason to believe it nor disbelieve it.

Q. O.K. And isn't it also a fact that you had no reason to believe that she was dangerous?

A. I can't make that judgment as I had not come in contact with her before personally.

Q. O.K. But you didn't believe her to be dangerous; isn't that correct?

A. I had every——

Q. You didn't know whether she was or wasn't?

The Court. Let him answer. You asked six questions at once.

A. Every narcotics dealer is potentially dangerous.

By Mr. Lublin:

Q. Well, yes, but this specific person you have never encountered before; is that correct?

A. That's what I testified.

Q. So you didn't know whether she was armed or unarmed, dangerous or not dangerous; isn't that correct?

A. That's what I testified to.

Q. O.K. What information led you to the belief prior to entering that home that there was in your own words a strong possibility of the evidence, that being the money or any drugs there, that would not be there or would not be there if

100 you did not obtain a search warrant at that time?

A. I don't understand your question, Counselor.

Q. You said earlier there was a strong possibility that the money or drugs wouldn't be there if you had gotten an arrest warrant. What led you to believe that there was a strong possibility of this?

A. Because in my past experience I found that money in the hands of a drug dealer seldom stays in one place very long and it is certainly—the drugs are not going to stay there very long, a fast turn over and they move out.

Q. Those were your sole reasons for determining that there was a strong possibility of the money and the drugs not being there; is that correct?

A. In my opinion, yes, as a police officer and knowing what I know about the drug traffic in the city of Philadelphia, that is correct.

Mr. Lublin. I have nothing further, thank you.

Mr. Eisman. I have one other question.

By Mr. Eisman:

Q. You have no information that Mrs. Santana or anybody else in the house was aware that you had arrested McCafferty; is that right?

A. I have what? I am sorry.

Q. I say you have no information that either Miss Santana or anybody else at the house knew you had arrested McCafferty; is that right?

101 A. We were a block and a half from her home when the arrest was made. I am sure that the word would have been back within a matter of seconds or minutes.

Q. You had no specific information?
A. No, no specific information, no.
Q. You are guessing, then, that somebody might have gotten the word back; is that right?
A. Yes, that's correct.
Mr. EISMAN. I have no further questions.
Mr. McBRIDE. No questions.
The COURT. You may step down, Sergeant.
Oh, Seageant Pruitt, were all the officers armed?
The WITNESS. Yes, Your Honor.
The COURT. And were they required to be armed for this particular mission?
The WITNESS. They are required to be armed at all times, Your Honor.
The COURT. Thank you.
Mr. McBRIDE. Will you ask Officer Morse to come in, please.

[TESTIMONY OF OFFICER FREDERICK MORSE]

FREDERICK MORSE, sworn.

DIRECT EXAMINATION

By Mr. McBRIDE:

Q. Officer Morse, how long have you been employed
102 by the Narcotics Squad of Philadelphia?

A. I have been in the Narcotics Squad approximately 10 months.
Q. All right. Were you employed with them on August 16, 1974?
A. Yes, sir, I was.
Q. And did you have occasion to take part in an investigation involving Dominga Santana and William Alejandro?
A. Yes, sir, I did.
Q. All right. Did that investigation take you to the premises at 2311 North Fifth Street?
A. Yes, sir, it did.
Q. All right. Would you picking up tell us what happened when you arrived at 2311 North Fifth Street? Would you relate to the court what you did at that time?

A. Yes, sir.
If Your Honor please, on August 16, 1974, at approximately 7:35 P.M. in company with other members of the Narcotics Squad I came to the residence of 2311 North Fifth Street. We got out and identified ourselves as police officers.
Dominga Santana ran back inside. Strohm went first. Sergeant Pruitt was second.
As we entered the dining room area I observed Officer Strohm struggling with Mrs. Dominga Santana, trying to take a bag out of her hand when two bundles of glasine packets dropped on the floor.

At this time Mr. Alejandro ran down and picked up
103 the two bundles of glasine packets and was going towards a table which was in the dining room area which I observed had one meat cleaver and one carving knife on it.

I at this time struck Mr. Alejandro once on the top of the head with my blackjack, causing him to go down on the floor. I picked up the drugs and gave them to Policeman Strohm and secured Mr. Alejandro, placed him under arrest.
Mr. McBRIDE. Cross examine.
The COURT. Mr. Lublin?

CROSS EXAMINATION

By Mr. LUBLIN:

Q. How many men from Narcotics were at the area at this time?
A. Well, there was myself, Sergeant Pruitt, Officer Strohm, and I believe Willy Davis and Gary—Officer Davis, the both Davises was on the outside. I am not sure.
Q. Did either of the Davises ever go in?
A. I don't recall.
Q. Is it your testimony that Mrs. Santana was outside of the home?
A. No, she was in the doorway.
Q. You had come from 22nd and Hunting Park originally; is that correct?
A. Originally, yes.

Q. 22nd and Hunting Park is Narcotics Headquarters;
104 is that correct?

A. No. 5 Squad Headquarters.
Q. At that time?
A. That's right, still is, sir.
Q. Still is? O.K. Some of the other narcotics are down——
A. The rest of the squad are down at 8th and Race.
Q. Did Mr. Alejandro ever touch any of those knives there?
A. He didn't have a chance to, sir.
The COURT. The answer is "No"?
The WITNESS. No, sir.
Mr. LUBLIN. No further questions.
The COURT. Mr. Eisman?
Mr. EISMAN. I have no questions.
The COURT. Mr. McBride?
Mr. MCBRIDE. Does the court have any?
The COURT. Yes.
Were the knives and the cleaver—tell us, where were they?
The WITNESS. They were on the dining room table, sir.
The COURT. What else was on the dining room table?
The WITNESS. Oh, I believe they had some papers on there and I believe they had, like, a punch bowl, I think.
The COURT. Were there any other implements, cooking
105 implements, the kind of things you find in a kitchen?
The WITNESS. Not to my knowledge, no, sir.
The COURT. All right. That's all, thank you. You may step down.
Mr. MCBRIDE. Thank you.
That concludes the Government's witnesses, sir.
The COURT. All right. Can we have your first witness, Mr. Lublin?
Mr. EISMAN. Your Honor?
The COURT. Or Mr. Eisman?
Mr. EISMAN. I think I will put the first witness on.
The COURT. You think you will what? I didn't hear you.
Mr. EISMAN. I will place my witness on.
The COURT. All right, fine.
Mr. EISMAN. We want Carmen Colon.
Mr. MCBRIDE. May the police officers come back into the courtroom now, sir, since they are finished testifying?
The COURT. Any objection to that?

Mr. EISMAN. I have no objection as long as they are not going to testify any further.
Mr. MCBRIDE. Not on the suppression that I know of unless in rebuttal because of some of your people.
Mr. EISMAN. Well, if there is a possibility they might
106 be brought back in, I would ask they stay out.
The COURT. Mr. Eisman would like them to stay out. I will honor that. They may be called on rebuttal or redirect or something. They also may testify at a trial if there is one.

[TESTIMONY OF CARMEN COLON]

CARMEN COLON, sworn.

DIRECT EXAMINATION

The COURT. All right, Mr. Eisman.
By Mr. EISMAN:
Q. Carmen, I direct your attention to the 16th of——
Mr. MCBRIDE. Excuse me, can we have an offer of proof on this witness, sir?
The COURT. Yes, would you outline to the court what you expect to prove?
Mr. EISMAN. She was present at the time that the officers——
The COURT. ——entered the house?
Mr. EISMAN. ——entered the house.
The COURT. And she is offered to explain some of the circumstances surrounding that episode?
Mr. EISMAN. Yes, sir.
The COURT. All right, I will permit that.
Mr. MCBRIDE. Allegedly she did not take any part in it; is that correct?
The COURT. Well, she may have. Let's hear what she
107 says.
Mr. MCBRIDE. All I want to know is, if she is in any way going to implicate herself, then I think she should be aware of what she is doing on that.
Mr. EISMAN. No, she is just a witness.
Mr. MCBRIDE. O.K. I didn't want her to implicate herself unwittingly. I want her to do it wittingly if she is going to do so.
Mr. EISMAN. She was just identified, at least according to this 49 police report, as being in the residence.

The COURT. I will listen and if it looks like we are getting into a dangerous area, I will warn her of her rights.

By Mr. EISMAN:

Q. Mrs. Colon, were you present at 2311 North Fifth Street on the evening of August 16, 1974?

A. Yes. I was.

Q. And where were you prior to the time the police arrived?

A. I was on the top of the stairs outside by the door.

Q. O.K. and I want you to relate exactly what occurred when you first observed certain people coming towards the house?

A. Well, I seen all kinds of people running to the house.

Q. Now, when you say "all kinds of people," were they men or women?

A. They were mens.

Q. How were they dressed?

108 A. They wore regular clothes.

Q. And what if anything did they have in their hands?

A. They have guns.

Q. Did you notice any badges?

A. No.

Q. Did they say who they were?

A. No.

Q. What did they do?

A. They just ran and say, "Hold it, freeze."

Mr. MCBRIDE. What? I can't hear.

The COURT. They ran and said, "Hold it, freeze."

Try to keep your voice up. O.K.? Otherwise you will have to repeat everything.

The WITNESS. O.K.

The COURT. Speak very loudly so we can all hear.

By Mr. EISMAN:

Q. Where did they go?

A. They went into 2311 Fifth Street.

Q. All right. And did you see Dominga Santana in the house prior to the time they arrived?

A. Yes.

Q. Where was she?

A. She was right in the hallway from the door.

Q. All right. Now, did she have anything in her hand at that time?

109 A. No.

Q. And what did they do when they got past you?

A. When they stopped toward us and said, "Freeze," that's when they ran, and when they ran in, there was two cops there fighting in the hallway.

Q. Two cops fighting with her?

A. There were two cops fighting with each other.

Q. What were they doing? What were they arguing about?

A. I don't know. One of them was talking about,"Stay outside." That was it.

The COURT. One was saying what?

The WITNESS. "Stay outside."

The COURT. "Stay outside"?

The WITNESS. Yes.

The COURT. Trying to talk the other one into staying outside?

The WITNESS. Right He as talking to the other cop. One cop was telling the other cop.

The COURT. All right.

Mr. Mr. EISMAN:

Q. Then what did you do?

A. I walked in.

Q. And what did you observe?

A. I see they had a bag in their hands.

Q. Who had a bag in their hands?

110 A. One of the cops.

Q. O.K. And what if anything else did you observe?

A. They have William the guy that was in there that was supposed to be named William, and the lady that was in the house.

The COURT. Is it William over here at the table?

The WITNESS. Yes.

The COURT. And the lady, Mrs. Santana?

The WITNESS. Yes, sir.

By Mr. EISMAN:

Q. And what were they doing?

A. They just went in at the time.

Q. All right. Now, what were they doing with relation to Dominga and William?

A. They was asking for some marked money at the time that I walked in.

Q. All right. Now, did you see them search either Dominga or William?

A. I seen when they dragged the guy upstairs and they told Dominga Santana to empty her pockets.

Q. All right. When she emptied her pockets what did she have in her pockets?

A. She had $24 in her pockets and some keys.

Q. Now, did they search for any more money in the house?

A. They were searching the house at the time and actually what they found was an orange used bottle full of quarters you know, half dollars, and dollars or coins.

Q. Where did they find that, do you know?

A. That's all in Miss Santana's house, in the room.

Q. What room, do you know?

A. Yes, sir, her room.

Q. What?

A. Her room.

Q. Her room, which is where?

A. Which is in the front.

Q. The first floor or second floor?

A. Second floor front.

Q. How long were they in the house searching?

A. They was there—I can't tell you the exact time. They was there for a few hours.

Q. And did they search you also?

A. Yes.

Q. Did they take you into the police station?

A. Yes.

Q. What happened to all the other people that were sitting out on the steps?

A. Well, the people that was outside, some of them left and some of them couldn't come into there.

Q. Did you overhear the police saying anything other than, "Freeze, hold it"?

A. That's exactly what they said.

112 Q. What?

A. That's all they said.

Q. When did you find out that these people were police?

A. When I was talking to one of them.

Q. When?

A. In the house.

Q. What did you think they were?

A. I thought it was a stick u:., they was going to stick up the house or something. That's what I thought, because they was in the regular clothes and they just had guns. They didn't show a badge or nothing.

Q. Did they come in police cars or unmarked?

A. To tell you the truth, I didn't see them come out of the car at all. I just seen them running towards us.

Mr. EISMAN. I have no other questions at this time.

The COURT. Mr. McBride?

CROSS EXAMINATION

By Mr. McBRIDE:

Q. Miss Colon, are you related to either one of the defendants?

A. Miss Santana, she is my mother-in-law.

Q. She is your mother-in-law? I see.

You thought that the officers when they were running towards the house were stick-up men and they were going

113 to rob and hold up the house; is that right?

A. Yes.

Q. Why did you walk into the house, then, if you thought this was going on?

A. Because the only person that was there was the guy and my mother-in-law and I was by the door when they ran in, that I see, you know. I see two guys were fighting. I just——

Q. Two cops were fighting?

A. To see what happened, yes.

Q. How did you know that they were cops if you just walked in?

A. I knew they were cops after I was in the house.

Q. How did you find out?

A. I knew they were cops.

Q. How did you find out?

A. When I was in the house, I was talking to one of the guys there and they told me they were cops.

Q. Was this after you walked in and saw them fighting or before?

A. No, that's when I walked inside the house; right?

Q. Yes.

A. They were fighting; right?

Q. Right. And you knew they were cops?

A. No, I didn't know they were cops. When I talked to one of them, he told me they were a cop which is William Davis which is not here.

Q. Oh. Well, when you thought the place was being held up——

114 A. Yes.

Q.——why didn't you run to somebody's phone and call the police rather than just walk into the middle of that hold-up?

A. I knew my mother-in-law was there by herself.

Q. And you thought you were going to be of some help against these people with guns?

A. Well, I was going in, either way.

Q. It couldn't be you knew they were police in the first place?

A. No. I didn't know they were police.

Mr. McBRIDE. I see. I have no further questions.

Mr. LUBLIN. I have no questions.

The COURT. All right. Right before they went in, you were standing on the front steps next door?

The WITNESS. No, I was right outside in front of the house, 2311.

The COURT. Oh, their front step?

The WITNESS. On the front step.

The COURT. Oh.

The WITNESS. On the top.

The COURT. On the steps or on the sidewalk?

The WITNESS. On the top step.

The COURT. On the top? How many other people were around that vicinity?

The WITNESS. There was my sister-in-law sitting right, you know—here goes the steps—right over there by the pave-

115 ment, looking towards the house, and my other sister-in-law here and some girls that was with us. We was smoking and talking.

The COURT. About how many people were there?

The WITNESS. There were about seven girls.

The COURT. Seven girls all outside?

The WITNESS. All sitting outside.

The COURT. Did anybody else go in after you went into the house?

The WITNESS. No.

The COURT. Following the men with the guns?

The WITNESS. No.

The COURT. Did any of these people outside go call the police?

The WITNESS. I don't know where they went because they didn't never go back out.

The COURT. I see. All right. They are the only questions that I have.

Any more questions of this witness?

Mr. LUBLIN. No.

The COURT. You may step down, thank you.

Mr. EISMAN. Your Honor, I have two more witnesses who will be brief. I am not going to speak to them but could I just have five minutes?

The COURT. Yes. We will take a five-minute recess.

116 A(recess was taken at 4:00 P.M.)

The COURT. All right, Mr. Eisman.

Mr. EISMAN. We call Santa Santana to the stand.

The COURT. All right, come up here, please. Do we have the interpreter?

All right, here he comes. That's all right.

[TESTIMONY OF SANTA SANTANA]

SANTA SANTANA, sworn.

DIRECT EXAMINATION

By Mr. EISMAN:

Q. Santa, how old are you?

A. 16.

Q. And are you related to the defendant, Dominga Santana?

A. Yes.

Q. And what is the relation?
A. My mother.
Q. All right. Now, on August 16, 1974 were you at 2311 North Fifth Street?
A. I was outside.
Q. O.K. Now, at approximately 7:30 did anything unusual occur?
A. Well, it was, yes, around that time. I was outside, sitting on the steps with the baby next door and a whole bunch of people came up, you know, with guns.
Q. Did they say who they were?
A. No.
117 Q. What did they do?
A. They put a gun on everybody and they just said, "Freeze," and a whole bunch of them started running in the house.
Q. All right. Where was your mother at the time?
A. She was inside, coming outside, in the hallway.
Q. Where inside if you know?
A. She went inside to get a glass of water.
Q. All right. Do you know exactly where she was standing when these police came up?
A. I don't really know because I was standing outside.
Q. O.K. Did you see her outside when the police came up?
A. No.
Q. All right. Now, they said, "Freeze." Then what did they do?
A. They all ran in the house.
Q. Did they have anything in their hands?
A. They had a gun, pointing at everybody.
Q. How were they dressed?
A. They was dressed in regular clothes.
Q. Street clothes?
A. Yes.
Q. When did you find out they were police?
A. Well, I thought they were stick-ups because they ran in the house. There was two of them fighting to go in and I just left.
Q. Where did you go?

118 A. I went to the house next door to take the baby to the girl.
Q. To what?
A. To the girl next door.
Q. And when did you find out that they were police inside?
A. When I came out, they started—the people started saying they were police officers.
Q. That was the first time you knew they were police?
A. Yes.
Mr. EISMAN. I have no further questions.
The COURT. Mr. McBride?
Mr. MCBRIDE. I have no questions.
Mr. LUBLIN. No questions.
The COURT. You may step down, thank you.

• • • • • • •

In the Supreme Court of the United States

No. 75–19

UNITED STATES, PETITIONER

v.

DOMINGA SANTANA AND WILLIAM ALEJANDRO

ORDER ALLOWING CERTIORARI. Filed October 14, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-19

UNITED STATES OF AMERICA, *Petitioner*

v.

DOMINGA SANTANA, *Respondent*

and

WILLIAM ALEJANDRO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court should review matters not raised or passed upon in the courts below.

II. If so, whether exigent circumstances must exist in order to make a warrantless entry into a residence for the purpose of arresting a suspect.

COUNTER-STATEMENT OF THE CASE

The respondent was arrested by officers of the Philadelphia Police Department inside her residence at 2311 North Fifth Street, Philadelphia, Pennsylvania. At all times relevant to the consideration of the issues raised herein, respondent SANTANA was inside her residence. The residence can be described as a brick row home with one front doorway and a vestibule immediately inside the front doorway as the residence is entered.

Upon receiving information from Patricia McCafferty that she had purchased drugs from "Mom" SANTANA (TR 13-15) the officers proceeded to the above-described location where respondent was allegedly observed in the front doorway. The officers identified themselves at the front of the house by announcing "Police", (TR 68, 74-75, 80, 84, 102), but did not state their purpose to respondent prior to their entry into the residence and the arrest of respondent.[1] Another officer entered the residence through a rear door. (TR 68). Although the petition states that the police announced their "identity and purpose" (Petition, p. 10), this misstatement finds no support in the record. When the police arrived outside of respondent's residence in their vehicle, they alighted with guns drawn and identification cards in hand. At this time the respondent turned and *walked* toward the interior of the house (TR 68) with her back to the approaching officers. Although petitioner chooses to characterize respondent's action in turning and walking away from the front door as an attempt to retreat (Petition, p. 4) or "evade arrest" (Petition, p. 11), nothing in the record supports the conclusion that respondent had knowledge the police sought to arrest her, and that she knowingly attempted to avoid arrest and the trial court so found. On the contrary, it is petitioner's position that one

1. At the suppression hearing, the testimony was conflicting as to whether the mission was to arrest Santana or to search for bait money. (App. A, p. 3a).

objective of the prompt action taken here was to minimize the possibility that respondent would learn she was sought by the police. If that objective was indeed reasonable, it would be equally reasonable to infer that respondent had no idea what the purpose of the police might have been when they alighted from their vehicle.

REASONS FOR DENYING THE WRIT

1. This Court should review only those matters raised or passed upon in the courts below. The contention raised now, that a warrant is not necessary to arrest a person in her residence even though exigent circumstances have not been established, was not raised previously.

In argument before both the trial court and Court of Appeals, petitioner contended that a warrant is necessary in order to make an arrest of a person in her residence, absent exigent circumstances. Petitioner, in its brief in the Court of Appeals (p. 9), stated:

> "The narrow question before this court is whether, under all the circumstances of this case, the arrest of the defendants without a warrant was reasonable. The answer to this would seem to turn on whether or not sufficient exigent circumstances existed at the time of the defendant's arrest so that the officers could properly forego procuring an arrest warrant."

The Court of Appeals appears to have understood the above to be the issue presented for decision because its judgment (App. B, p. 7a), explicitly states the contention of petitioner which it considered.

Petitioner also argued below that exigent circumstances existed at the time of respondent's arrest which justified the absence of a warrant. In addition to the usual catalogue of circumstances offered by the prosecution to justify a warrantless arrest or search, the petitioner argued that the mere circumstance that this arrest was for a crime involving narcotics in and of itself excused the constitutional requirement that a warrant be obtained to enter a residence to make an arrest. Thus petitioner embarks in the opposite direction in this court from the course which it took below.

Compelling reasons exist which would justify this Court's refusal to review the issues raised here for the first time. First, this Court has held on numerous occasions that its review of decisions will generally be restricted to matters raised and passed upon below. *Wood v. Strickland*, — U.S. —, 95 S.Ct. 992 at 1003; *Rugendorf v. United States*, 376 U.S. 528; *Wiener v. United States*, 357 U.S. 349 at 351.

Second, no extraordinary reason has been offered which would merit an exception to the general rule. Although petitioner contends that *United States v. Watson*, *cert. granted*, 420 U.S. 924, presents a similar issue to that raised by the facts of the instant case and supports its contention by arguing that in both cases *the officers* were in a public place, in reality the cases are completely dissimilar because the relevant inquiry does not concern itself with where the police officers were or from where they made their observation of the arrestees. The more relevant consideration is where the arrestees were at the time of their respective arrests. While Watson was arrested in a public place, a restaurant, respondent in this case was arrested inside her home.

The third reason for not granting certiorari is the salutary effect on the criminal justice system of encouraging the parties to raise their arguments at the earliest opportunity. Granting review on the issues now raised for the first time removes the professional necessity for diligent preparation, penalizes the opposing party, denies the trial court an opportunity to correct the error alleged to have occurred, erodes the finality of the trial court and Court of Appeals' rulings, encourages unnecessary and frivolous appeals and needlessly discourages alert representation. This Court should not be required to expend time and energy where no trial court and Court of Appeals rulings have been made. In addition, this Court should be free to more expeditiously dispose of issues which are properly preserved for appeal. Finally, by not granting review in this case, the court will remove the advantage enjoyed by the unprepared trial lawyer who looks to the appellate court to compensate for his trial omissions.

2. Exigent circumstances must exist in order to make a warrantless entry into a residence for the purpose of arresting a suspected felon.

The Fourth Amendment proclaims:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This provision protects and safeguards all citizens against unwarranted intrusions by police and other government officials. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment. *Agnello v. United States*, 269 U.S. 20.

> "The requirement of a warrant, as now generally understood, rests primarily on the conception that it is for a judicial officer, and not the prosecution or police, to determine whether the security of our society, which is essential to the maintenance of a rule of law, requires that the right of privacy yield to a right of entry, search and seizure, and what limitation and specification of entry may be appropriate and reasonable." *Dorman v. United States*, 435 F.2d 385, 389 (C.A.D.C.).

This Court has recognized the increasing importance of the need for warrants. *Chimel v. California*, 395 U.S. 752, restricted the scope of a search of premises that was permissible without a warrant to the area immediately within the control of the suspect which might yield dangerous instrumentalities or aid in escape. In *Camara v. Municipal Court*, 387 U.S. 523, this Court held that searches incident to administrative inspections are subject

to the warrant requirement, reversing its previously held position.

The basic principle of the Fourth Amendment that assures the right of privacy and security of the home is applicable not only in the case of entry to search for property, but also to effect an arrest of a suspected felon. Certainly the warrant requirement may be exercised where circumstances exist which do not tolerate delay, but that is not the situation in the instant case. Although petitioner argues that "considerable risk" (Brief, p. 8) existed that respondents would learn of McCafferty's arrest and thus flee or destroy evidence, all of the evidence is to the contrary, as the trial court stated. The arresting officers were in plainclothes inside an unmarked vehicle away from the residence of SANTANA when McCafferty was arrested. How news of her arrest could reach respondents before the police could obtain a warrant is not explained by petitioner, nor does it necessarily follow that if respondents learned of her arrest they would flee or destroy evidence.

This Court has stated that "in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances." *Terry v. Ohio*, 392 U.S. 1. *Warden v. Hayden*, 387 U.S. 294, focused on the exigency surrounding danger of an armed robber at large, not explicitly on the "hot pursuit" formulation in excusing the warrant requirement:

> "They [the police] acted reasonably when they entered the house and began to search for a man of the description they had been given *and for weapons* which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so *would gravely endanger their lives or the lives of others*. Speed here was essential, and only a thorough search of the house for persons and weapons would have insured that Hayden was the only man present and *that the police had control of all weapons* which could be used against them or to effect an escape." *Id.*, pp. 298-299 (emphasis added).

The exigency which the majority explicitly relied on in *Hayden* was not "hot pursuit" but the danger of an armed robber to police and the public. No weapons or physical danger are present in this case. In any event, characterizing the action of SANTANA in turning and walking from her doorway (TR. 68) into the interior of her residence as a retreat to "evade arrest" (Brief, p. 11), requiring "hot pursuit" is to distort those terms beyond recognition. A suspect cannot be deemed to be avoiding arrest unless it appears on the record she knew that the purpose of the police was to arrest her. Nowhere in the record does it appear that the police announced their purpose. The action of a person *walking* away is not consistent with an intention to flee and certainly does not present a "hot pursuit" situation. The trial court found that "[T]here was no evidence that either defendant made an effort to flee." (App. A, p. 4a).

In *Coolidge v. New Hampshire*, 403 U.S. 443, the plurality opinion, joined by Justice Harlan, described *Hayden, supra*, as standing for the proposition that "an arrest warrant is required in the absence of exigent circumstances." *Id.*, at 481.

Both the trial court and Court of Appeals found that no exigent circumstances existed to justify the warrantless entry of respondent's residence to arrest her. (App. A; App. B). These findings resulted from a balancing process between the individual's right of privacy and security in her home and the need for effective law enforcement.

The trial court found that "there is no evidence that either defendant was armed," (App. A, p. 4a), "no evidence that there was a need to prevent the escape of either defendant," (App. A, p. 4a), "no evidence that either defendant made an effort to flee." (App. A, p. 4a). On the contrary "the move by defendant SANTANA into the house was a natural response of a person standing in a doorway under the circumstances that faced her when the police officers ran up the steps as opposed to an effort to escape." (App. A, p. 4a). Likewise, the court found "no basis to conclude that

[evidence] was to be destroyed," (App. A, p. 4a), and that under the circumstances "a warrant could have been obtained for either a search or an arrest." (App. A, p. 5a).

CONCLUSION

For the above reasons, respondent prays this Court to deny the petition for writ of certiorari. The issues raised here were not raised in the courts below. The facts in this case are not comparable to those in *United States v. Watson, cert. granted*, 420 U.S. 924 and this case is not a "logical counterpart" (Brief, p. 12) to *Watson*.

Respectfully submitted,

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Supreme Court, U. S.
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No. 75-19

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

DOMINGA SANTANA AND WILLIAM ALEJANDRO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum addresses respondents' assertion that the government did not present to the court of appeals the arguments contained in our petition. Respondents' contention is inaccurate.

Respondents were arrested inside respondent Santana's residence. The district court concluded that "if this event had taken place in other than a residence it may very well have supported a warrantless entry for either search or arrest, but under the circumstances the court believes that a warrant could have been obtained for either a search or an arrest" (Pet. App. 5a).

The government's brief on appeal[1] (p. 8) contained a single argument: "The arrest of the defendants * * * was proper under all the circumstances of this case and, therefore, [the seized narcotics] should not have been suppressed." The brief went on (*ibid.*): "[T]here is no question but that the arrests of both [respondents] were lawful.

---

[1]A copy of the brief is being lodged with the clerk of this Court.

It has long been the law, both in the Commonwealth of Pennsylvania and in the federal courts, that an officer may arrest without a warrant when there is probable cause [to believe] that a felony has been committed and that the person being arrested has committed the felony."

The brief then considered the possibility that entry into Santana's vestibule affected the application of this rule in the present case. It argued (*id.* at 9): "The narrow question before this Court is whether, under all the circumstances of this case, the arrest of the defendants without a warrant was reasonable." The brief cited and discussed two prior Third Circuit cases (*United States* v. *Davis*, 461 F.2d 1026; *United States* v. *Rubin*, 474 F.2d 262) that had upheld warrantless entries into houses or apartments to make an arrest (*id.* at 9-12). Following the analysis the court of appeals had used in *Rubin* and *Davis*, the brief urged a number of reasons for upholding the lawfulness of the entry into Santana's residence (*id.* at 14-18): (1) Word of McCafferty's arrest would quickly get back to Santana; (2) Santana might destroy the narcotics; (3) Santana might remove or destroy the marked money; (4) Santana retreated as the police approached; otherwise, the officers would have made the arrest outdoors; (5) There was no forcible entry; (6) There was no time to obtain a warrant.

We think there can be no doubt that this brief adequately presented to the court of appeals both the questions we have presented in our petition and the analysis with which our petition approached those questions. Respondents' contention that we are raising issues in this Court for the first time is thus erroneous and provides no justification for denying the petition.

For the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

Supreme Court, U. S.
FILED
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No. 75-19

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

DOMINGA SANTANA AND WILLIAM ALEJANDRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The court of appeals rendered no opinion. The oral opinion of the district court (Pet. App. 1a–6a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a) was entered on March 21, 1975, and the government's timely petition for rehearing and suggestion of rehearing *en banc* was denied on May 8, 1975 (Pet. App. 8a). On May 30, 1975, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including July 7, 1975. The

petition was filed on July 3, 1975, and was granted on October 14, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an arrest warrant is required in order to make an arrest, on probable cause, of a person standing in plain view in the doorway of her residence.

2. If not, whether the police may effect a warrantless arrest if the suspect retreats into her residence.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On August 16, 1974, at approximately 6:35 p.m., Michael Gilletti, an undercover officer with the Philadelphia Narcotics Squad, telephoned Patricia McCafferty (from whom he had purchased narcotics before) and told her that he wished to purchase a "bundle" of heroin (App. 6, 8–9). McCafferty, not knowing that Gilletti was a law enforcement officer, agreed; she told him that they would "go down to Mom Santana's for the dope," which would cost $115 (App. 6). McCafferty also indicated that "Mom" resided at 2311 North Fifth Street (*ibid.*).[1]

Gilletti informed his immediate supervisor of the proposed heroin purchase, arranged for surveillance, and recorded the serial numbers of the bills he intended to use (App. 7, 13–14). At about 7:00 p.m. Gilletti left the police station and met with McCafferty. She directed him to drive to Fifth and Dauphin Streets, where Gilletti parked his car and gave McCafferty $110. McCafferty walked to the residence at 2311 North Fifth Street. She spoke briefly with respondent Alejandro, who was sitting on the front steps, and entered the residence accompanied by Alejandro. Approximately five minutes later Alejandro appeared at the doorway. McCafferty then left the residence and returned to Gilletti's car. After driving about a block and a half, Gilletti stopped the car and McCafferty handed him several glassine packets of heroin. Gilletti arrested McCafferty and

[1] Officer Gilletti stated that he had known Santana previously and had investigated whether Santana might be selling narcotics (App. 16–17, 21–23). Counsel for respondents argued that Gilletti therefore possessed probable cause to arrest her prior to August 16 and for that reason should have obtained a warrant for her arrest. Gilletti testified, however, that he did not trust the informant who had previously implicated Santana (App. 17–19, 23), that Santana had recently moved (App. 16, 21), and that when he personally attempted to approach 2311 North Fifth Street to determine whether Santana now lived there and, if so, whether she would sell him narcotics, he turned back because he feared that he had been recognized by someone who knew that he was an undercover officer (App. 10–12).

gave a pre-arranged signal (indicating a successful purchase) to four surveillance officers who were trailing him in a van (App. 7–8, 29–30, 42). After being given *Miranda* warnings, McCafferty told Gilletti that "Mom Santana has the money" (App. 8).

Upon learning that Santana had the marked money, three of the surveillance officers immediately returned to the row house at 2311 North Fifth Street. As they drove up to the front of Santana's residence, they saw Santana standing in the open doorway with a brown paper bag in her hand.[2] The officers testified that they got out of their van with their weapons drawn. One officer shouted "police" and held his identification in his hand (App. 30–31, 34, 35, 38, 41, 53).[3] When the officers approached the door, Santana retreated into the vestibule (App. 31, 38, 53). The officers followed through the open front door and, as Santana attempted to leave the vestibule and enter the adjoining living room, an officer took her hand and placed her under arrest (App. 31). A struggle ensued during which two "bundles of glazed paper packets [containing] a white powder fell to the floor" (*ibid.*). Respondent

[2] Officer Strohm testified that he recognized Santana, whom he had seen before (App. 34). Strohm's testimony also indicated that Santana was standing directly in the doorway—one step forward would have put her outside the house and one step in the other direction would have put her in the vestibule of her residence (App. 33).

[3] Santana's daughter and daughter-in-law testified that the officers did not identify themselves as police and that the approach of the officers to the house appeared to be a robbery (App. 56–63). The district court did not resolve the conflict between their testimony and that of the officers.

Alejandro, who had been sitting in the living room, picked up the packets and attempted to flee, but he was subdued and arrested by another officer (App. 53).

Following the brief scuffle, Santana was asked to empty her pockets. She complied, producing $135, of which $70 could be identified as marked money given by Gilletti to McCafferty (App. 39, 45). The bag that Santana had been holding was found to contain heroin, packaged as "15 bundles of white powder in glazed paper packets" (App. 31).

2. An indictment filed in the United States District Court for the Eastern District of Pennsylvania charged McCafferty with distribution of heroin, in violation of 21 U.S.C. 841, and Santana and Alejandro with possession of heroin with intent to distribute, in violation of the same section. McCafferty pleaded guilty. Santana and Alejandro moved to suppress the heroin and money found during and after their arrests.[4]

The district court read its opinion from the bench on November 13, 1974 (Pet. App. 1a–6a). The court concluded that "[t]here was strong probable cause [to believe] that [respondent] Santana had participated in the transaction with Defendant McCafferty"

[4] It is unclear what grounds, if any, provide respondent Alejandro with standing to challenge the seizure of the heroin and money. At least to the extent the ostensible illegality consisted of a failure to obtain a warrant for Santana's arrest, there would seem little basis to accord Alejandro standing. However, the government did not contest his standing in either the district court or the court of appeals and, accordingly, we have not presented it as an issue for resolution by this Court.

(Pet. App. 3a). The court asserted that it did not wish to "criticize" the "difficult decisions" made by the officers "under the extreme emergency posture of a case like this" (*id.* at 5a). The court nevertheless suppressed the evidence. The court apparently concluded that the arrest was unconstitutional because made without a warrant. "The key to the case in the court's view is the basis upon which a warrantless entry into a person's residence can be made for either an arrest or a search" (*id.* at 2a). After recounting that an officer had testified that he went to the house to arrest respondent Santana, the court stated that this would "require a warrant, * * * a warrant of arrest under ordinary circumstances * * *" (*id.* at 3a).

The court listed a number of factors that, it asserted, lent support to the officers' decision to make a warrantless arrest in this case—the suspected offense was "grave" and not "complacent" (*id.* at 3a); there was strong probable cause to believe that Santana had participated in McCafferty's distribution of heroin to Gilletti (*ibid.*); there was strong evidence that Santana was on the premises (*ibid.*); and the arrests occurred during the daytime (*id.* at 4a). But, the court concluded, there was no indication that either respondent was armed or intended to flee; there were enough officers to surround the house and prevent an escape; and, because some of the marked money was found in Santana's pocket, "there was no basis to conclude that it was to be destroyed" (*id.* at 4a).

The district court then rejected the government's argument that Santana's arrest could be considered

part of the "hot pursuit" immediately after a crime; the court stated that hot pursuit means "a usual kind of a chase in and about public streets or places or even in and about a building" (*id.* at 4a–5a). Because it thought that there was no chase in this case, the court declined to uphold the arrest.

The United States appealed. The court of appeals affirmed without opinion (Pet. App. 7a).

SUMMARY OF ARGUMENT

I

A. This Court has held, without deviation, that probable cause is sufficient to support a warrantless felony arrest in a public place. See *Gerstein* v. *Pugh*, 420 U.S. 103, 111–116. There is no reason to depart from that rule, which adequately protects both the interest of society in apprehending criminals and the interest of the individual in his personal privacy. If the Court accepts the argument in this regard that we made in *United States* v. *Watson*, No. 74–538, argued October 8, 1975, this part of our argument in this case follows *a fortiori*. Indeed, the argument for the arrest of respondent Santana is even stronger than was the argument for the arrest of Watson; here, probable cause developed only moments before the arrest, and there was considerable risk that, had the officers delayed before arresting Santana, she would have found out about the arrest of McCafferty and, upon so learning, fled or destroyed the heroin and money she was known to possess.

B. The officers approached Santana as she was standing in plain view in the doorway of her residence. This is fully equivalent to approaching a suspect in a public place. Santana had abandoned any claim to the privacy of her whereabouts when she knowingly exposed herself to the view of all who were in the vicinity. She placed herself in the plain view of the officers who, having seen her, were entitled to approach her. It is not material to this argument that the officers had to enter the "curtilage" of Santana's house. The front walk and door of a house are intended as means for persons to approach the house, and the officers did not need advance judicial approval in order to use them in this invited way. By like reasoning, officers often approach the door of a house and ask for consent to enter. Accordingly, there was no impropriety whatsoever in the officers' attempt to effect a probable cause felony arrest of Santana as she stood in her doorway.

II

Since the officers were entitled to approach Santana, the evidence recovered incident to her arrest is admissible in evidence unless, by retreating into her vestibule as the officers approached, Santana acquired "sanctuary," compelling the officers to desist in their efforts and requiring them to obtain a warrant.

A. Assuming *arguendo* that officers ordinarily should obtain a warrant before entering a private residence in search of someone they have probable

cause to arrest, it does not follow that the entry into Santana's vestibule to arrest her was unconstitutional. The entry was not made in "search" of Santana. Santana had been observed in public view. The officers knew where she was and simply followed her through an open door. Entry onto her premises was necessary only because Santana sought to flee the police, and they were obliged, if they wished to make the arrest, to pursue her. We accordingly submit that this case falls squarely within the parameters of the traditional "hot pursuit" doctrine, even under the narrowest reasonable understanding of that doctrine.

But even had Santana not been literally "chased" into the house, the "hot pursuit" doctrine, correctly understood, authorized the officers' warrantless entry to effect her arrest. The doctrine is generally applicable, as an exception to whatever warrant requirement might otherwise exist, to arrests occurring within a reasonably short time after the commission of a crime. As is clear from *Warden* v. *Hayden*, 387 U.S. 294, the doctrine does not rest exclusively upon a "chase in and about public streets" (Pet. App. 5a). There was neither "chase" nor "pursuit" in *Hayden* itself; the arresting officers came to the house in which they found Hayden as the result of a tip received shortly after the crime.

The exception most logically rests upon the realization that some opportunities will be lost

forever if not capitalized upon at once. During the first few hours after a crime, the culprit is likely to be in possession of fruits, instrumentalities and other evidence of the crime; he may dispose of them as time passes. The culprit himself may be most accessible shortly after the crime, before he has had time to flee. Once substantial time has passed after the events, it may make sense to suppose that whatever is going to disappear, has disappeared, and that the additional time necessary to obtain a warrant will not unnecessarily jeopardize the investigation. But during the first few hours time may be of the essence; it is often impossible to tell, in a particular instance, whether evidence will disappear or whether the suspect will try to escape. In order to anticipate these exigencies it is reasonable for law enforcement officers to make the arrest quickly, before the feared events can come to pass.

B. We also submit that, apart from "hot pursuit," an arrest ordinarily can be made in a private place whether or not a warrant could have been obtained. At common law in England it was settled from at least 1603 that officers could enter a house to make a warrantless arrest. The courts have imposed only three requirements on these arrest entries: the official action must be reasonable; the arrest must be supported by probable cause; and, before using force to enter, the officers must announce their purpose and authority. Nearly every State has adopted these principles, and this Court has accepted that rule as part of our constitutional heritage (*e.g., Ker* v. *California,* 374 U.S. 23). That courts and legislatures

have for centuries followed a settled practice must, as a matter of sound constitutional doctrine, give pause to the impulse now to pronounce a different rule.

Although some lower federal courts, and three state courts, have abandoned the common law rule, more than history suggests that this Court should adhere to the traditional approach. As the American Law Institute put the matter, to "require a warrant or a showing of necessity before police may make a felony arrest on private property even in daytime seems unduly restrictive." ALI, *A Model Code of Pre-Arraignment Procedure* 146 (Official Draft 1972). To take the alternative course open here—to put a suspect under "house arrest" while seeking a warrant—would itself infringe substantially on the suspect's legitimate interests while incurring unacceptable risks to legitimate law enforcement ends. If Santana had discovered the "house arrest," she could have destroyed the evidence she was known to possess and could have attempted to arm herself to repulse the officers when they eventually attempted to arrest her. In sum, there are important social interests that call for different rules for entries to seize people from those governing entries to seize things.

C. If the Court nevertheless concludes that warrants may ordinarily be required for entries to arrest, the principle ought not be extended beyond the particular circumstances that would call for such advance judicial approval. As *Jones* v. *United States,* 357 U.S. 493, 499–500, indicated, the privacy interests of the individual are most powerfully implicated in

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forcible nighttime arrest entries. These interests can be fully protected by a rule that requires warrants only in those cases. To go further and create a presumptive warrant requirement, subject to defeasance in the many and varied instances where haste is appropriate, would offer little useful guidance to the officers charged with carrying out the rule. It would be difficult if not impossible for them to consider and "balance" the host of factors that would be relevant to such decisions, and the result might be repeated suppression of valuable evidence without any discernable improvement in the protection afforded individual privacy.

D. The arrest of Santana would come within the logical exceptions to even the most sweeping warrant requirement. There was "strong probable cause" to arrest Santana (Pet. App. 3a) for a crime committed only minutes before the arrest; there was absolute certainty that Santana was on the premises entered; no force was involved in the entry, which took place during daylight hours; an ongoing criminal activity was terminated. Moreover, the officers were aware of the possibility that Santana would learn of McCafferty's arrest and either flee or destroy evidence. Flight or destruction of evidence would have been quite likely if the officers had stopped at the threshhold as Santana retreated. It was therefore reasonable in these circumstances for the officers to pursue Santana into her vestibule.

E. Finally, even if the officers should not have entered Santana's vestibule without a warrant, the

evidence they seized should be admissible. Where, as here, the seizure was a fruit of the arrest itself (the marked money was recovered from Santana's person, and the heroin from a bag she had been carrying), rather than from the fact that the arrest occurred in a private place, the exclusionary rule has no proper role to play. The seizure was not attributable to the fact that the officers were in a place where they should not have been. All the items of evidence equally would have been seized if Santana had not retreated.

ARGUMENT

The district court held that the arrest was defective because made without a warrant. If Santana was lawfully arrested, the items seized incident to her arrest are admissible in a prosecution against either her or respondent Alejandro. Although the court of appeals did not render an opinion when it affirmed the district court's order, we can perceive only two possible grounds that would support an affirmance. First, the court of appeals may have concluded that all arrests require warrants in the absence of circumstances more "exigent" than "the extreme emergency posture of a case like this" (Pet. App. 5a). Second, the court of appeals may have concluded that, although probable cause is usually sufficient to support a felony arrest, a warrant was required here because Santana was arrested in the vestibule of her residence. We submit that neither of these alternative grounds is supportable.

We demonstrate in Part I of the argument that follows that an arrest for a felony is constitutional if the arrest is supported by probable cause. In Part II we discuss the effect of the fact that the arrest took place within Santana's residence and demonstrate that such an entry was reasonable under the circumstances of this case. The seizure of the marked money and heroin—incident to a lawful arrest—was therefore proper, and these items are admissible at trial against respondents.

I. NO WARRANT IS NECESSARY TO MAKE A PROBABLE CAUSE ARREST OF A PERSON STANDING IN PLAIN VIEW IN THE DOORWAY OF HER RESIDENCE

A. PROBABLE CAUSE SATISFIES THE FOURTH AMENDMENT'S REQUIREMENT OF REASONABLENESS

This Court has held, without deviation, that probable cause is sufficient to support a felony arrest with or without a warrant. We have argued in *United States* v. *Watson,* No. 74–538, certiorari granted, 420 U.S. 924, that there is no reason to depart from this rule.[5] We rely here upon the arguments made in our brief in *Watson.*

At common law in England, and today in all 50 States, the law has permitted felony arrests to be made upon probable cause or its equivalent, whether or not there was sufficient time to obtain a warrant. This Court too has concluded that a warrantless felony arrest is reasonable within the meaning of the Fourth Amendment if it is supported by probable cause. It

[5] Copies of our brief in *Watson* have been sent to counsel for respondents.

stated in *Carroll* v. *United States,* 267 U.S. 132, 156–157:

> ** * [A] police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and * * * he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence.

Since *Carroll* this Court repeatedly has upheld warrantless arrests on probable cause. One of those cases, *Henry* v. *United States,* 361 U.S. 98, involved 18 U.S.C. 3052, a statute authorizing agents of the Federal Bureau of Investigation to make warrantless arrests. The Court, speaking through Mr. Justice Douglas, held that the statute "states the constitutional standard" (361 U.S. at 100). And in *Gerstein* v. *Pugh,* 420 U.S. 103, 111–116, the Court observed that probable cause arrests never have been invalidated solely because officers failed to obtain a warrant and implied in the plainest terms that the issue of warrantless arrest remains unsettled only to the extent that the arrest takes place within a residence or other private place.

We submit that, in light of the constitutional history and applicable precedents, developed more fully at pages 14–26 of our brief in *Watson,* there could be no question concerning the constitutionality of respondents' arrests, if the arrests had occurred in a public place. Indeed, if the arrests had occurred in a public place, the argument for their constitutionality would be even stronger than that in *Watson.* In the present case, the arresting officers had "strong probable cause" (Pet. App. 2a) to believe that only

moments before the arrest Santana had sold heroin to McCafferty. McCafferty had identified Santana as the prospective source, had entered Santana's residence and, after emerging, producing heroin, and being arrested, had stated that Santana had the purchase money. The officers had probable cause to believe that Santana had supplied the heroin, was in possession of the purchase money, and was likely to be in possession of still more heroin. Moreover, although there was an opportunity to obtain a warrant for Watson's arrest, there was no comparable opportunity here unless the officers were willing to tolerate the considerable risk that Santana or Alejandro would learn of McCafferty's arrest and, upon so learning, flee (or dispose of, secrete or destroy the heroin and money they were known to possess).[6] So, too, the officers had reason to believe that Santana was committing the continuing offense of possession of heroin with intent to distribute; an immediate arrest would terminate the offense as it was being committed. *Trupiano* v. *United States*, 334 U.S. 699, 704–705; *United States* v. *Weaklem*, 517 F. 2d 70 (C.A. 9). Therefore, even if the Court should decide that a warrant was required

[6] Respondents argued in the district court that Officer Gilletti had probable cause to arrest Santana in advance of the transaction on August 16, and that the officers should have obtained a warrant during this interval. The evidence, which we have recounted at note 1, *supra*, does not support this theory.

Even if Officer Gilletti could have obtained a warrant for Santana's arrest in advance of the transaction with McCafferty, this fact would be immaterial, for the reasons we have discussed at pages 19–26 of our brief in *Watson*. What is more, the transaction between Santana and McCafferty furnished the officers with fresh

for Watson's arrest, no warrant would be required for Santana's arrest.[7]

The argument to this point has analogized the arrest of Santana to an arrest of a person observed in a public place. We now discuss the possibility that a person standing in plain view in the doorway of a residence should be treated differently.

B. THE ARREST OF A PERSON STANDING IN AN OPEN DOORWAY IS SUBJECT TO THE SAME RULES AS THE ARREST OF A PERSON IN A PUBLIC PLACE, BECAUSE THE EXPECTATIONS OF PRIVACY ARE SIMILAR

When the arresting officers arrived at Santana's residence, Santana was standing in the open doorway of her residence with a brown paper bag in her hand. She was in the plain view of the officers and of anyone else who passed by on the street. Although Santana was not in a public place, we submit that by standing in public view Santana abandoned most of the privacy to which she would have been entitled in

probable cause to arrest Santana for a recently committed offense. There was no opporunity for the officers to obtain a warrant with respect to the offense for which respondents were arrested, and the arrests would consequently be proper even if the officers were required to obtain a warrant to arrest Santana for an offense committed on some previous occasion. The court that decided *Watson* has limited it to cases in which there was a substantial delay between the acquisition of probable cause and the arrest. See *United States* v. *Weaklem*, 517 F. 2d 70, 72 (C.A. 9). Cf. our brief in *Watson* at pages 19–20, n. 10.

[7] It follows that it was proper to arrest respondent Alejandro, who scooped up two packets of heroin and attempted to flee (App. 53).

the interior of her home, and that the officers could approach her for the purpose of arresting her, just as if she had been in a public place.

The officers' observation of Santana, and their approach to her for the purpose of arresting her, are perhaps most closely analogous to the "plain view" doctrine that supports the seizure of objects. Santana was seen in plain view by officers who had a right to be upon the public streets. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure * * *" (*Harris* v. *United States,* 390 U.S. 234, 236). Santana abandoned her claim to personal privacy by willingly exposing herself to public observation. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" (*Katz* v. *United States,* 389 U.S. 347, 351).

The officers did not intrude upon Santana's property to make their observation of her. But even if they had not observed her until they were approaching her front door, their observations and approach would have been reasonable within the meaning of the Fourth Amendment. In *Air Pollution Variance Board of Colorado* v. *Western Alfalfa Corp.,* 416 U.S. 861, the Court upheld an inspector's entry into the property of the corporation for the purpose of making observations, where the observations occurred at a place from which the public was not excluded. The public ordinarily is not excluded from the areas immediately adjacent to houses. Indeed, the driveway and front

walkway of houses are usually thought of as means of access, to be used by all who arrive. Therefore, even if Santana had not been in plain view, it would have been permissible for the officers to approach Santana's residence, to ring the bell, and to inquire whether Santana was within.[8] If that is so, then there can be no reasonable question concerning the power of the officers to approach someone standing in plain view in the doorway of her residence.[9]

II. A WARRANT IS NOT REQUIRED TO EFFECT THE PROBABLE CAUSE ARREST OF A PERSON WHO, UPON BEING CONFRONTED BY ARRESTING OFFICERS, RETREATS INTO HER RESIDENCE

We have argued that the officers were entitled to approach Santana in the doorway of her home and to arrest her there. As the officers approached her, with guns and at least one identification card displayed

[8] Cf. *United States* v. *Magana,* 512 F. 2d 1169 (C.A. 9), certiorari denied, October 6, 1975, No. 74–1361. Federal agents drove a van onto the driveway of a private residence and arrested the occupant, who was standing in plain view between the house and the garage. The occupant contended that the entry upon the driveway was improper and that, because he could not have been seen from the street, his arrest was consequently improper. The court of appeals rejected this argument, relying upon *Katz*; it held that law enforcement officers, no less than private citizens, are entitled to use driveways and walkways that give access to a house. See also *United States* v. *Capps,* 435 F. 2d 637 (C.A. 9); *United States* v. *Langley,* 466 F. 2d 27 (C.A. 6).

[9] Cf. *Ponce* v. *Craven,* 409 F. 2d 621, 624–625 (C.A. 9), certiorari denied, 397 U.S. 1012 (officers standing in a parking lot see and hear occupants of motel room committing a crime; warrantless entry to make arrest upheld); *Gil* v. *Beto,* 440 F. 2d 666 (C.A. 5); *Taylor* v. *Arizona,* 471 F.2d 848 (C.A. 9), certiorari denied, 409 U.S. 1130.

(see page 4, *supra*), she retreated from the doorway into the vestibule. There was but a slight distance from the curb to Santana's door, however, and an officer overtook her before she retreated further from the vestibule into the living room of her residence. We submit that the arrest was not the less reasonable because it took place in the vestibule rather than on the doorstep. An individual is not entitled to seek "sanctuary" in her home as the police approach to effect a lawful arrest.

We discuss, in turn, two alternative arguments that support this result. We contend, first, that even if a search or arrest warrant ordinarily is required before officers can enter a residence to make an arrest, that requirement does not apply when the officers follow an individual into her home in fresh pursuit soon after a crime has been committed. Alternatively, if this case is not considered suitable for analysis under an analogue to the fresh pursuit rationale, we argue that the arrest still must be upheld because warrants are not generally required to make probable cause arrests even within an offender's residence. Finally, we argue that even if the officers should have obtained a warrant in this case, the evidence should be admitted because it was a fruit of the arrest rather than a fruit of the entry or of any search of the premises.

A. OFFICERS ARE ENTITLED TO ENTER A RESIDENCE IN PURSUIT OF A SUSPECT DISCOVERED ONLY MINUTES AFTER THE COMMISSION OF A CRIME

Assuming *arguendo* that officers ordinarily should acquire a warrant before entering a private residence

in search of someone they have probable cause to arrest, it does not follow that the entry into Santana's vestibule to arrest her was unconstitutional. Indeed, the very statement of the constitutional right suggested by the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 480, demonstrates its inapplicability to cases of the present sort. The officers did not enter Santana's residence *in search of her;* they simply followed her through the open door. No "search" for her was necessary, and none was conducted.

1. In the district court and the court of appeals the government analogized the officers' conduct to the "hot pursuit" entry approved in *Warden* v. *Hayden*, 387 U.S. 294, 297–299. The district court rejected this analogy, stating that the "hot pursuit" rationale applies only to the "usual kind of a chase in and about public streets or places or even in and about a building" (Pet. App. 5a). Because in its view this case involved no "chase" that "ended up into [*sic*] the house" (*ibid.*), the court concluded that there had been no "hot pursuit."

We agree with the district court that the expression "hot pursuit" seems to imply some sort of "chase." To the extent that a "chase" or "pursuit" is a necessary ingredient of the doctrine, however, we submit that it was present here. The officers had seen Santana from a public place and properly approached her in order to arrest her. When Santana retreated, the officers followed her in close pursuit. The "hot pursuit" doctrine reasonably requires no more in the way of a

"chase" than action by officers to follow an individual fleeing from the outside of a private place into the inside. Cf. *Commonwealth* v. *Hughes*, 219 Pa. Super. 181, 280 A. 2d 556, in which the Pennsylvania court approved a warrantless arrest entry when a suspect, discovered in the hallway of an apartment building, retreated into one of the rooms.[10]

In short, even under the most narrow reasonable understanding of the traditional "hot pursuit" doctrine, Santana's arrest was lawful. We believe that the Court need go no further. We present the arguments that follow, however, out of an abundance of caution, aware that the Court on several occasions has expressed concern about warrantless entries to make arrests.[11]

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[10] The approval by Pennsylvania courts of an arrest similar to that of respondent Santana is significant because, if an arrest by state officers passes muster under state law, only federal constitutional issues remain. *Miller* v. *United States*, 357 U.S. 301, 305–306. We would argue in an appropriate case that evidence seized as a result of an arrest meeting all constitutional standards can be introduced in a federal prosecution without regard to the legality of the arrest under state law. Cf. *Elkins* v. *United States*, 364 U.S. 206, 223–224; Fed. R. Evid. 402. Since the arrest in this case was lawful under state law, however, it is unnecessary for the Court to consider that argument in this case.

[11] We present them, too, to inform the Court of our position in light of the brief filed by the Americans for Effective Law Enforcement and the National District Attorney's Association. *Amici* assume (perhaps relying upon the "negative inference" from *Warden* v. ~~Hughes~~, *supra;* see note 20, *infra*) that a warrant ordinarily is necessary to make an arrest entry and that this case therefore requires an explication of the "exigent circumstances" doctrine. As our argument indicates, we believe that arrest entries can be made in many cases whether or not the circumstances are "exigent" in the sense that they would justify an entry for purposes of a search.

Hayden

2. Although we believe that there was "pursuit" in this case, we submit that, correctly understood, the "hot pursuit" doctrine does not require such direct pursuit. In fact, "hot pursuit" has been used in two senses, both by this Court and in the common law. The first sense, on which we rely in the preceding argument, has involved an actual chase. Courts have held that, when officers chase a suspect into a building, the officers can follow without observing the ordinary requirement (codified at 18 U.S.C. 3109) that they announce their authority and purpose. See Wilgus, *Arrest Without A Warrant,* 22 Mich. L. Rev. 541, 798, 804 (1924). "Where such circumstances as an escape and hot pursuit by the arresting officer leave no doubt that the fleeing felon is aware of the officer's presence and purpose, pausing at the threshold to make the ordinary requisite announcement and demand would be a superfluous act which the law does not require." *Ker* v. *California,* 374 U.S. 23, 55 (Brennan, J., dissenting in part). In such cases the chase is the essence of the rule, for it is the chase itself that puts the suspect on notice of the officers' authority and purpose and therefore excuses pausing at the threshold to give notice of authority and make demand to enter. The physical fact that there has been a chase serves to dispose with a prerequisite to forcible entry that must otherwise be observed.

"Hot pursuit" was used in quite another sense in *Warden* v. *Hayden, supra,* for in that case the "hot pursuit" supplied the reason to enter a house in search of a suspect. In *Hayden* officers who had not per-

sonally witnessed a robbery were informed by a taxi driver that a man resembling the robbery suspect had entered a certain residence. The officers promptly entered the residence and fanned out throughout the house. One officer arrested the suspect; another officer, searching the inside of a toilet tank, came upon a gun that had been used in the robbery; still a third, searching through a washing machine in the basement, found clothing that the robber had worn. The Court upheld not only the entry into the house and the arrest but also the thorough search. It concluded that the officers were not required to delay in the course of their investigation to obtain a warrant, where that delay might have allowed the suspect to escape, to endanger others, or to destroy evidence. The Court recognized that some things are evanescent; even though the suspect was apprehended in his own home, he might not have remained there, or he might have succeeded in destroying the evidence. The officers could have surrounded the house and sought a warrant, but the Court did not require them to do so.

There was no "chase" in *Hayden*. The suspect was inside his home when the officers learned of his whereabouts. Nor has there been a "chase" in other recent cases applying the "hot pursuit" doctrine. For example, in *United States* v. *Holland*, 511 F. 2d 38 (C.A. 6), certiorari denied, 421 U.S. 1001, the officers apprehended the suspect approximately an hour after the crime as a result of detective work and leads compiled by visiting several addresses to which the suspect might have repaired; there was no chase. In *United States* v. *Scott*, 520 F. 2d 697 (C.A. 9), the officers

apprehended their suspect nearly two hours after the crime, having tracked down the car that the suspect apparently had used and found his location by patiently ascertaining where he had *not* gone; there was no chase. Cf. *United States* v. *Monteill*, C.A. 2, No. 75–1274, decided November 26, 1975. Whether or not cases like these use the term "hot pursuit," they share a common feature: the officers are acting as part of a chain of events leading, with only brief interruptions, from the crime directly to the arrest.

We submit that these cases are correctly decided. Even if there ought to be a requirement of a warrant, in ordinary circumstances, before officers can enter a house to search for a suspect, these cases correctly create an exception for entries in the course of a reasonably prompt investigation during the hours immediately after the crime. The exception is supported by the certainty that some opportunities will be lost forever if not capitalized upon at once. During the first few hours after the crime the culprit is likely to be in possession of the instrumentalities and fruits of the crime; he may dispose of these as time passes. During the first few hours after the crime an arrest of the culprit is most likely to yield evidence (whether clothing, as in *Warden* v. *Hayden, supra;* or fingernail scrapings, as in *Cupp* v. *Murphy*, 412 U.S. 291; or something else) that may disappear if given the chance to do so. Once substantial time has elapsed after the crime, it may make some sense to presume that whatever is going to disappear, has disappeared, and, upon that presumption, to conclude that the few hours of additional delay necessary to procure a war-

rant will not unnecessarily jeopardize the investigation or further diminish the chances of capture. But during the first few hours time is of the essence; it is often impossible to tell, in any individual case, what evidence will disappear, or whether the suspect will try to escape. And, in consequence, it is reasonable for law enforcement officers to be free to move quickly in all cases, before the feared events can come to pass.

At the same time, an entry to make an arrest during the time shortly after the crime has been committed poses few of the dangers that might ordinarily be thought to accompany warrantless entries in search of suspects. Almost by definition, the entry soon after the crime will not be a pretextual entry—an entry purportedly to arrest but actually to search the premises. By defining the requisites of entry in such a way that it is part of the reasonably continuous flow of events after the crime, it is possible to ensure that the officers are not staging their arrest at a time most likely to enable them to search.[12] Similarly, because the officers are acting upon information and facts that may be only a few minutes old, there is little likelihood that premises will be entered on the basis of faulty memories, or to search for evidence of crimes that may (or may not) have occurred long ago.

It could be argued in opposition that, although this is true in the run of cases, the exigencies calling

[12] And, of course, the problem of pretextual arrests has been significantly alleviated by *Chimel* v. *California*, 395 U.S. 752, which held that a search incident to arrest is confined to the immediate whereabouts of the person arrested.

for a warrantless entry to make an arrest do not apply in some other cases. In the instant case, for example, the district court concluded that the arresting officers had no proof that respondents would have fled or destroyed evidence if they had delayed their investigation to obtain a warrant. And that may well be true. But the justification supporting expeditious action after a crime has been committed ought not to turn upon the question whether, in a particular case, flight appeared to be or was imminent or evidence was soon to be destroyed. The entry to make a warrantless arrest is reasonable within the meaning of the Fourth Amendment because it is reasonable to suppose that in many instances within this class of cases flight will occur or evidence will be destroyed. To require the officers to deduce, on the spur of the moment, whether the felon they are then and there apprehending is likely to flee or to destroy or secrete evidence if given the opportunity, is to require the impossible. It should be enough that flight and destruction of evidence occur soon after a crime in many cases.

We submit that the Court should hold here, as it held in *United States* v. *Robinson*, 414 U.S. 218, that the nature of the justification for the official conduct is such that the conduct is reasonable as applied to all cases arguably within the scope of that justification, whether or not the officers can point to particular factors that would make their actions imperative in the particular case. See generally LaFave, *"Case-by-Case Adjudication" Versus "Standardized Proce-*

dures": *The Robinson Dilemma,* 1974 Sup. Ct. Rev. 127. "A highly sophisticated set of rules, qualified by all sorts of ifs, and, and buts * * * may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' If the rules are impossible of application by the police, the result may be the sustaining of motions to suppress on Fourth Amendment grounds with some regularity, but this can hardly be taken as proof that 'the people' are 'secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' Rather, that security can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement" (*id.* at 141–142; footnotes omitted).[13]

There will, of course, be many occasions for which categorical rules will be inappropriate and on which

[13] Professor LaFave suggests that, whenever possible, the courts should attempt to establish generalized rules applicable to categories of cases—rules capable of statement in such a way that proper police conduct can be ascertained beforehand, without the need for sophisticated on-the-spot balancing of many competing factors. He contends that there are many sorts of case in which the "balancing" necessary to determine whether the official conduct is "reasonable" can be accomplished by the judiciary and incorporated into rules capable of mechanical application. The rule that arrest entries may be made without a warrant during the hours immediately after a crime has been committed is such a rule and, we contend, is justified by the balance of considerations applying to such cases as a class.

individualized determinations of the reasonableness of official conduct will be necessary. We do not advocate the abolition of case-by-case inquiries when circumstances call for them. But rules of general applicability sometimes are feasible and, when they are, can reduce the need for individualized determinations. Cases involving arrests reasonably promptly after a crime are, we submit, appropriately dealt with by a categorical rule arrived at by prior balancing of the interests involved.

The instant case fits comfortably within the class of cases that would be addressed by such a categorical rule. The officers acted promptly after a crime had occurred. They apprehended one of the perpetrators of that crime and were able to preserve critical evidence. Their actions averted any possibility of flight or disappearance of evidence that might have occurred if respondents had found out about the arrest of McCafferty. See *United States* v. *Mapp,* 476 F. 2d 67, 74 (C.A. 2).[14] Furthermore, the prompt arrest terminated the crime of heroin possession then being

[14] "Mapp, who had just been arrested, was entitled to make one telephone call, a call he might have placed to Mrs. Walters, warning her of the imminent danger of arrest. * * * It was also possible that Mapp planned to return to Mrs. Walter's apartment within a few hours; his failure to return, as a result of the arrest, might have alerted Mrs. Walters to possible danger, resulting in the destruction of evidence."

committed by Santana and foreclosed the possibility that she would be able to accomplish further criminal distributions of the substance.

B. A WARRANT ORDINARILY IS NOT REQUIRED TO ENTER A PRIVATE PLACE IN ORDER TO SEARCH FOR SOMEONE WHOM THERE IS PROBABLE CAUSE TO ARREST

The police officer's decision to arrest brings into conflict two basic social interests: the interest in apprehending those guilty of crime, and the inconsistent interest of the individual in the privacy of his own person. We discussed in our brief in *Watson* the manner in which these competing interests have been accommodated. Excluding brief investigative stops of the kind considered in *Terry v. Ohio,* 392 U.S. 1, and like cases, the individual's interest gives way only if the officer possesses probable cause, and the existence of probable cause may properly be put to the test by a judicial hearing shortly after the arrest rather than by an *ex parte* warrant application prior to it. This accommodation gives a substantial measure of protection to the interest of the individual, while recognizing that investigations could be frustrated by a requirement of antecedent judicial approval of arrests. See *Gerstein* v. *Pugh,* 420 U.S. 103, 111–116.

An additional interest is involved when the officers must enter a private place to search for the person

to be arrested. An arrest entry implicates not only the individual's interest in the privacy of his person, but also his interest (and possibly that of other occupants of the place) in the privacy of his surroundings. Law enforcement officers ordinarily cannot enter a private place to *search* for things until they have received the prior approval of a neutral and detached magistrate; this rule applies even when the officers, once having found the thing they seek, can *seize* it without additional prior approval.

Proceeding by analogy, it would be possible to argue that the same rule should apply to entries to make an arrest. Although officers can seize a person and arrest him without an arrest warrant, they arguably should be required to obtain a search warrant in order to enter a private place to search for him.[15] This argument is apparently logical, and it has the virtue of producing symmetry between the law of entry to conduct a search for things to be seized and the law of entry to conduct a search for persons to be seized. But we submit that the argument is not without its flaws. People

[15] See generally Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stan. L. Rev. 995 (1971). An arrest warrant may do service for a search warrant, at least for purposes of searching the subject's house.

are more mobile than things, and this difference may call for different rules. History, too, has its claims. For nearly 400 years Anglo-American law has recognized the difference between an entry to search for things and an entry to search for people. We begin with an analysis of this history.

1. *At Common Law In England, And In The United States At The Time The Fourth Amendment Was Adopted, Warrantless Entries To Make Arrests Were The Accepted Practice*

The most authoritative discussion of the common law power of officers to make arrests in private places appears in *Semayne's Case,* 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603). The Kings Bench, while acknowledging that "the house of every one is to him as his * * * castle and fortress, as well for his defence against injury and violence, as for his repose * * *" (5 Co. Rep. at 91b), concluded that his house furnished no refuge when he had committed a felony. It declared that "[i]n all cases when the King * * * is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors * * *" (*ibid.*).

In cases in which the official action was reasonable, there was probable cause to arrest, and force was not needed to enter, the rule allowing entry to make warrantless arrests has been followed in England without deviation, so far as we are aware. Indeed,

most courts and commentators adopted the further position that force could be used to make a warrantless arrest so long as the officers gave notice of authority and made demand to enter before breaking in. This seems to have been the general rule. See Sheppard, *The Offices of Constables,* ch. 8, § 2, no. 4 (1650):

> For it is the chief part of their office to represse fellony, and albeit it be a man's house he doth dwell in, which they doe suspect the fellon be in, yet they may enter in there to search; and if the owner of the house, upon request, will not open his dores, it seems that the officer may break open the dores upon him to come in to search.

See also 1 Hale, *Pleas of the Crown* 582–583 (1847). Other commentators were of opinion that, in the absence of fresh pursuit, a warrant should be obtained before breaking doors. See 2 Hawkins, *Pleas of the Crown,* ch. 14, § 7 (1787); Coke, *Fourth Institute of the Laws of England* 177 (1797). No one questioned the rule that if force were not used to enter, no warrant was necessary.

The English courts were concerned not with warrantless entries to make arrests, but with searches and arrests authorized by warrants and supported by less than probable cause. See generally Taylor, *Two Studies in Constitutional Interpretation* 27–43 (1969). In the 18th century the government's policies (and the king himself) came under cirticism that many

officials believed was seditious. In an attempt to put an end to the criticism, the king's agents issued warrants authorizing extensive searches and arrests directed against the suspected authors of the anti-government literature. The officials who executed these warrants were sued in trespass, leading to the landmark case of *Entick* v. *Carrington,* 19 How. St. Tri. 1029, 95 Eng. Rep. 807 (K.B. 1765). *Entick* condemned the use of general warrants—a condemnation that was well known to the framers of the Constitution.

As this Court has remarked (*Boyd* v. *United States,* 116 U.S. 616, 626–627), *Entick* was considered during the formative years of our Republic as the "true and ultimate expression of constitutional law" that informed those who drafted and approved the Fourth Amendment. The colonists' concern with general warrants was strengthened by their experience with the infamous writs of assistance, which permitted the bearer to enter anywhere during daylight hours to search for and seize goods imported in violation of the customs laws. Cf. *Stanford* v. *Texas,* 379 U.S. 476, 481–484. Madison's draft of the provision that became the Fourth Amendment reflected this concern.[16] The

[16] Madison addressed the House upon the introduction of the proposed amendments, arguing (1 Annals of Congress 456 (1789)):

"The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government."

A few months earlier, in a letter to George Eve, Madison had written (1 *Letters and Other Writings of James Madison* 446–447 (1865)):

"[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c."

text he introduced provided (1 Annals of Congress 784 (1789)):

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

The House understood that this amendment was intended to be aimed specifically and solely against the use of certain sorts of warrants; when Representative Benson proposed that the phrase "and no warrant shall issue" be substituted for "by warrants issuing," the proposal was soundly defeated. *Ibid.* The Benson version was finally adopted, it seems, by oversight. See Lasson, *History and Development of the Fourth Amendment of the United States Constitution* 101–102 (1937) (footnotes omitted; emphasis in original):

> [O]n August 24, when Benson as chairman of a Committee of Three, which had been appointed to arrange the amendments, reported an arrangement of the amendments as they were supposed to have been agreed upon by the

House, the *clause appeared as he had proposed it and as the House had rejected it.*

And so it stands today. The records do not show that the alteration was ever noticed or assented to as such by the House. In this form it was received and agreed to by the Senate. And the only remaining discussion by the House and Senate concerned those amendments upon which the two houses were not in accord.

Nothing in this history suggests that the framers desired to upset the settled practice allowing warrantless entries to effect arrests. Indeed, in both England and the United States the practice of making such entries has continued to the present day, and Hale's view, permitting the use of force, appears to have prevailed.[17]

[17] The rule has been so well settled that until recently it has received only the most casual treatment by the commentators. For example, Annotation, 5 A.L.R. 263 (1920), laid it down as a clear rule that "a police officer * * * may make a peaceable or forcible entry to search any premises without a search warrant, for the purpose of arresting one accused of felony * * *. But the person making the search must have reasonable and just cause to believe the person he seeks to arrest is on the premises searched." For other discussions of the American practice, see Taylor, *supra*, at 27–28; Wilgus, *supra*, 22 Mich. L. Rev. at 549; Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 50; *United States* v. *Hall*, 348 F.2d 837, 841 (C.A. 2) (Friendly, J.); *Commonwealth* v. *Carey*, 12 Cush. 246, 251–252 (Mass.). For other statements of the English rule see, *e.g.*, 4 Stephens, *New Commentaries on the Laws of England*, ch. 16, § 3, p. 359 (1845); 4 Blackstone, *Commentaries* 292 (1897); 1 Chitty, *Criminal Law* 15–26, 33, 51–59 (1847); 10 Halsbury's *Laws of England* 354 (3d ed. 1955).

2. This Court Has Acknowledged The Validity of Warrantless Entries To Effect Probable Cause Arrests

Until the last few decades, this Court had not been confronted with a claim that a warrant was required to enter a private place in search of a person whom there was probable cause to arrest. Perhaps the first case presenting the question was *Johnson* v. *United States,* 333 U.S. 10. There officers entered a hotel room and arrested the occupant for drug offenses. The Court held that a warrant was required to enter the room under the circumstances of the case because, since the officers did not know the identity of the individual within, the entry could not be justified as an arrest entry. The Court indicated, however, that if the officers had known the identity of the person to be arrested, they could have entered without a warrant to make an arrest "for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty" (333 U.S. at 15; footnote omitted).

The dictum in *Johnson* was reiterated in *Trupiano* v. *United States,* 334 U.S. 699, 704–705. The officers, who knew that several individuals had built and were operating a still, had more than three weeks to procure search or arrest warrants. Instead of securing warrants, they converged upon the building in which the still was located and arrested one Antoniole, who was found within. The Court indicated that the arrest was proper where the arresting officers observed An-

toniole committing the crime.[18] Cf. *United States* v. *Rabinowitz,* 339 U.S. 56, 60 (warrantless arrest entry proper where officers have probable cause to believe that a felony is being committed in their presence) (dictum).

Then, in *Miller* v. *United States,* 357 U.S. 301, the Court dealt with an arrest similar to the arrest of respondents. A man named Reed had been arrested for a drug offense. He told the police that he had purchased his heroin from Shepherd, who procured his supply from Miller. At 3:00 a.m., a federal agent went to Shepherd's home and paid $100 to Shepherd, who promised to secure heroin from Miller. Shepherd went to Miller's apartment house and emerged with heroin and without the $100. A group of federal agents and local police immediately proceeded to Miller's apartment, broke in, arrested Miller, and recovered the $100. The Court held that evidence seized in Miller's apartment must be suppressed because the officers had not announced their authority and purpose before breaking in; it indicated that, if the proper announcement had been made, the entry, arrest and seizure of evidence would have been proper, 357 U.S. at 302–308.

Ker v. *California,* 374 U.S. 23, held that the standards of conduct applicable to the federal government

[18] The Court also concluded that it was improper to seize items found in plain view when Antoniole was arrested. This portion of *Trupiano* was overruled by *United States* v. *Rabinowitz*, 339 U.S. 56. *Rabinowitz* was in turn overruled by *Chimel* v. *California*, 395 U.S. 752, to the extent *Rabinowitz* allowed a seizure of items not found in plain view or within the immediate control of the person arrested. Neither *Rabinowitz* nor *Chimel* affected the discussion in *Trupiano* relating to the validity of the arrest of Antoniole.

under the Fourth Amendment also apply to the States under the Fourteenth Amendment. The official conduct involved in *Ker* was a warrantless entry into an apartment for the purpose of making a warrantless arrest. The Court upheld the warrantless entry. Even the dissenters contended only that the officers had not adequately announced their authority and purposes before breaking into the apartment. See *id.* at 47–49 (Brennan, J., dissenting in part). No Justice questioned the rule that a warrantless forcible entry properly can follow such an announcement, and four Justices expressly adopted that rule.

Finally, in *Sabbath* v. *United States,* 391 U.S. 585, the Court again indicated that an entry to make an arrest on probable cause is reasonable within the meaning of the Fourth Amendment if preceded by the proper announcement and demand. It wrote: "This Court has held * * * that the validity of an entry of a federal officer to effect an arrest without a warrant 'must be tested by criteria identical with those embodied in' [18 U.S.C. 3109]" (391 U.S. at 588, footnote omitted, quoting from *Miller, supra,* 357 U.S. at 306). Section 3109 authorizes forcible entry after notice of authority and demand to enter. Although the Court held that an unannounced entry through an unlocked but closed door did not meet the criteria of Section 3109, the proposition that the arrest entry would have been upheld if the requirement of announcement had been observed is implicit in its decision.

Although none of these cases expressly hold that warrantless arrest entries are presumptively reason-

able within the meaning of the Fourth Amendment, all of them appear to accept the common law rule as so much a part of our jurisprudence that it could be acknowledged without the need for a formal holding. At the time the Court was writing these decisions, every State that had occasion to consider the matter had provided for warrantless arrest entries; the validity of such police action was clearly a part of the fabric of our law.[19] There was little need to endorse

[19] ALI *A Model Code of Pre-Arraignment Procedure* 240–241 (Official Draft 1972), collects the statutes in 37 States establishing the right to make entries to effect arrests without warrants. Other States have approved the practice by judicial decision. See *People* v. *Eddington*, 23 Mich. App. 210, affirmed, 387 Mich. 551, 198 N.W. 2d 297; *Wanzer* v. *State*, 202 Md. 601, 97 A.2d 914; *State* v. *Doyle*, 42 N.J. 334, 200 A.2d 606. In Pennsylvania the power to make warrantless arrests is granted by Pa. R. Crim. P. 101 and 130. See also *Commonwealth* v. *Bosurgi*, 411 Pa. 56, 66; *Commonwealth* v. *Rush*, 326 A.2d 340 (Pa. Sup. Ct.); *Commonwealth* v. *Hughes*, *supra*. Congress is in agreement. See D.C. Code § 23–591 (1973).

The state statutes also reflect the division in the common law cases regarding the permissibility of using force to effect an arrest entry. Thirty of the 37 statutes allow forcible warrantless entries to make felony arrests, while the remaining seven statutes require a warrant to break open doors. Several of the statutes allowing warrantless entries have been amended or carried forward after the date of the ALI's compilation, but none of the States has changed its position. See Alaska Statutes § 12.25.100 (1973); Colorado Revised Statutes, tit. 16, § 3–101(3) (1974); West's Florida Statutes Annotated § 901.19(1) (1973); Kansas Statutes Annotated § 22–2405 (1974); Michigan Statutes Annotated § 28.880 (1972); Mississippi Code Annotated § 99–3–11 (1973); Nebraska Revised Statutes § 29.411 (Cum. Supp. 1974); Nevada Revised Statutes § 171.138 (1973); North Carolina General Statutes § 15–43 (1975); North Dakota Century Code Annotated § 29–06–14 (1974); Ohio Revised Code Annotated § 2935.12 (Anderson 1975); Oregon Revised Statutes § 133.320 (1973–1974).

the rule because defendants in criminal cases did not challenge it.

We know of no cases in this Court supporting a contrary position, although doubts have been expressed. In *Jones* v. *United States*, 357 U.S. 493, 499–500, the Court's holding enabled it to avoid "a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." (The entry in the instant case did not occur at night, nor was it forceful.) Four justices expressed doubts in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 476–481, reasoning that "[i]t is clear * * * that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances'" (403 U.S. at 477–478). The plurality in *Coolidge* found it unnecessary to resolve this conflict. And so the rule stands today.[20]

[20] The plurality in *Coolidge* believed that "[t]he case of *Warden* v. *Hayden*, *supra*, where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the

3. *There Is No Persuasive Reason to Set Aside 400 Years of Practice and Establish a Presumptive Rule That a Warrant Is Necessary to Enter a Private Place to Make an Arrest on Probable Cause*

The common law practice of making warrantless entries to effect felony arrests has been followed in most States.[21] Until recently it also had been approved by the lower federal courts. However, in 1970 the District of Columbia Circuit adopted a rule, subject to broadly-defined exceptions, that warrants ordinarly are required to make arrest entries (*Dorman* v. *United States,* 435 F. 2d 385 (*en banc*)).[22] The *Dorman* approach has been adopted by the Fourth, Sixth, Eighth, and Ninth Circuits, and by the highest courts of three States.[23] Other courts of appeals have continued to follow the common law practice.[24] Still others have not had an opportunity to speak on this subject since *Dorman.*

absence of exigent circumstances." 403 U.S. at 480–481. We respectfully disagree with this analysis. *Hayden* used the "hot pursuit" justification both to justify the entry to make an arrest and to justify the thorough search of the house in which the suspect was hiding. The officers searched, for example, the contents of a washing machine. Whether or not the officers were at liberty to enter to make the arrest, the "hot pursuit" justification would have been necessary to support the extensive search. Moreover, we do not believe that a practice so long used in Anglo-American law can be rejected by "negative implication." Nor has the Court interpreted *Hayden* in the fashion suggested by the plurality in *Coolidge*. See *Sabbath, supra.*

[21] See note 19, *supra.*

[22] *Dorman* overruled *Washington* v. *United States,* 263 F. 2d 742 (C.A.D.C.) (Burger, J.), which had approved warrantless arrest entries.

[23] *Vance* v. *North Carolina,* 432 F. 2d 984 (C.A. 4); *United States* v. *Shye,* 492 F. 2d 886, 891 (C.A. 6); *Salvador* v. *United States,* 505 F. 2d 1348 (C.A. 8); *United States* v. *Phillips,* 497 F. 2d 1131 (C.A. 9); *Commonwealth* v. *Forde,* 329 N.E. 2d 717 (Mass.); *Stuck* v. *State,* 255 Ind. 350, 264 N.E. 2d 611; *Nilson* v. *State,* 272 Md. 179, 185–191, 321 A. 2d 301, 304–308.

We submit that the Court should not now set aside a practice long followed in England and this country. While we do not suggest that history ought to blind this Court to the interests involved in warrantless arrest entries, "recognition of that reality does not liberate us from all historical restraint." *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 256 (Powell, J., concurring). When courts and legislatures have for centuries followed a settled practice, this Court is perforce constrained not to consider the validity of the practice as though it were a matter of first impression.

We do not rely, however, upon history and *stare decisis* alone for support. The American Law Institute recently completed its study of pre-arraignment procedures and has concluded that officers should continue to be empowered to make warrantless arrest entries. ALI, *A Model Code of Pre-Arraignment Procedure* § 120.6(1) (Official Draft 1972). The *Model Code* would change the traditional rule only to the extent of establishing a presumptive need for a warrant to

[24] See *United States* v. *Fernandez,* 480 F. 2d 726, 740, n. 20 (C.A. 2) (Friendly, J.); *United States* v. *Wysocki,* 457 F. 2d 1155, 1159 (C.A. 5) ("In our judgment not only did the officers, *as prudent men,* have probable cause to arrest Wysocki, they would have been negligent and derelict in the performance of their duties if they had failed to arrest him"); *United States ex rel. Wright* v. *Woods,* 432 F. 2d 1143 (C.A. 7). The position of the Third Circuit is less than clear. See *Fisher* v. *Volz.* 496 F. 2d 333; *United States* v. *Miles,* 468 F. 2d 482; *United States* v. *Davis,* 461 F. 2d 1026.

make an arrest in the nighttime; even then, no warrant would be necessary if the officer making the arrest reasonably believed that a prompt arrest would be necessary to prevent escape, harm to bystanders, or destruction of evidence (*id.* at § 120.6(3)(b)). The commentary explains that the requirement of probable cause for a daytime arrest provides ample protection to the legitimate interests of the individual. "To go further and require a warrant or a showing of necessity before police may make a felony arrest on private property even in daytime seems unduly restrictive" (*id.* at 146).

The distinction drawn by the American Law Institute is a reasonable one.[25] People are different from things because people are more active than things. To require a warrant as a matter of course before the police can enter a house to make an arrest would in many cases offer the suspect unacceptably large opportunities to escape or destroy evidence. Law enforcement officers might be able to avert escapes by placing suspects under "house arrest" while a warrant is being sought, but that course, too, has its dangers. Upon learning of his "house arrest," the suspect could destroy any evidence within the house. He also could arm himself and endanger the lives of the officers when they eventually attempt to make the arrest.[26]

[25] See also ALI, *Code of Criminal Procedure* § 28 (1930); ALI, *Restatement (Second) of Torts* § 206 (1965), which adopt the common law rules.

[26] In most cases it is not possible for officers to ascertain in advance whether suspects are armed. In the instant case respondents were not armed when they were apprehended. But the officers did not know this. And respondents might have had weapons in the house that they could have used if they had been put on notice of the impending arrest.

Moreover, entries to make arrests are, as a class, less intrusive than entries to search for things. Ordinarily, when officers arrive at a house for the purpose of arresting a particular individual, that individual will come to the door and accede to the officers' demand, and no entry into the premises will be required. A search, on the other hand, will ordinarily require intrusion into the premises.[27] And even if the individual whom the officers seek to arrest attempts to hide, the scope of the search for his person will be far less intrusive than the typical search, since it will involve no rummaging through private papers, drawers and cupboards, medicine cabinets, or the like.

The burden of our argument is that the Fourth Amendment requires only that official actions be reasonable, and that arrest entries, as a class, should be deemed presumptively reasonable if the officers have good grounds to believe that a person whom they have probable cause to arrest for a felony is within. True, the Court has held that an entry into a house to search for a chattel is unreasonable unless authorized by a warrant, justified by exigent circumstances, or authorized by the consent of the occupant. But reasonable-

[27] It is true that, in at least some instances, a search of the house could be avoided if the occupants produce the object sought. But usually, as in a search for drugs, stolen goods, gambling records, or the like, the police will need to search anyway to ensure that all of the material sought has been secured.

ness, not the presence or absence of a warrant, is the test in the last ana'vsis. As this Court has pointed out in analogous contexts, the question is not whether it would have been reasonable to get a warrant, but whether the official action was reasonable. *Cooper* v. *California,* 386 U.S. 58, 62; *United States* v. *Edwards,* 415 U.S. 800, 807. Cf. *Wyman* v. *James,* 400 U.S. 309, 318.

In summary, we submit that there are important differences between the considerations pertaining to the seizure of chattels and those pertaining to the seizure of people. Because of these differences—practical as well as historical—it is ordinarily reasonable for law enforcement officers to enter a house without a warrant to make an arrest. As Mr. Justice White has suggested in his dissent in *Coolidge* (403 U.S. at 512, n. 1), the time and mode of entry in a particular case may be unreasonable, and, if so, the arrest would be improper. But the possibility that some arrest entries will be unreasonable is not a sufficient justification for requiring warrants prior to all arrest entries.

C. ANY REQUIREMENT OF WARRANTS TO MAKE ARREST ENTRIES SHOULD BE LIMITED TO NIGHTTIME OR DELAYED ARRESTS

If, as the Court suggested in *Jones* and the plurality suggested in *Coolidge,* warrants sometimes should be obtained before entering a house to search for someone whom there is probable cause to arrest, the Court could formulate two different sorts of rule to achieve that result.

The first sort of rule, which we believe would be the more sound approach, would state that warrants are necessary in carefully defined situations. *Jones* expressed concern about forcible nighttime entries; a rule responding to this concern would require warrants for such entries, which by their nature are more intrusive than daytime entries. This rule would be similar to the rule suggested by the American Law Institute. (Indeed, it might well be regarded as unreasonable to make a nighttime entry, warrant or no warrant, when a daytime entry would have served as well.) Similarly, because entries to make arrests for crimes long completed are more likely to be mistaken, and are more open to abuse, than are entries to arrest individuals for freshly committed or ongoing crimes, the Court might hold that warrants ordinarily should be obtained to make arrests for crimes completed more than a few hours prior to the arrest. See our argument at pages 25–29, *supra.* The rules requiring warrants in such cases would, of course, be subject to the traditional exceptions for exigent circumstances or consent.

The second sort of rule would provide that a warrant is ordinarily required to make *any* arrest entry. This is the position taken by *Dorman,* which qualified the presumption in favor of a warrant with a lengthy list of circumstances that might justify warrantless entries. *Dorman, supra,* 435 F. 2d at 392–393.

If the Court holds that some arrest entries are unreasonable in the absence of a warrant, we submit that it should formulate a rule of the first sort in preference to the *Dorman* approach. Such a rule would give specific guidance to the officer contemplating the possibility of an arrest. The *Dorman* formulation, which requires numerous exceptions and "balancing" factors, offers no similar guidance. The *Dorman* court listed seven factors that police should consider when determining whether to make a warrantless arrest entry (*ibid.*). A list twice that length could easily be proposed.[28] But it is difficult to understand how the officer

[28] We can think of at least 15 relevant factors: (1) advance opportunity to obtain a warrant; (2) the nature of the premises entered (dwelling versus barn, for example); (3) likelihood of intruding upon the privacy of third parties; (4) whether the offense is ongoing or has been completed; (5) risk of escape or flight; (6) whether an informant or agent is already on the premises; (7) the gravity of the crime for which the arrest will be made, especially whether the crime involved violence; (8) whether the suspect is likely to endanger the officers when captured; (9) whether the suspect is likely to endanger third parties if allowed temporarily to remain at large; (10) the existence of an ulterior motive to search the premises on which the arrest will be made (this might be evidenced, for example, by the officers' failure to avail themselves of an earlier opportunity to make the arrest in a public place); (11) time of the arrest; (12) whether the entry is forcible; (13) how strong is the probability that the suspect is within the premises to be entered; (14) how long it would take to obtain a warrant if the attempt were made to do so; (15) whether the suspect is arrested in his own home (where he may be presumed to be) or elsewhere (where he is less likely to be).

can be expected to recall and balance numerous factors on the spur of the moment. What should he do if most factors indicate immediate arrest, and a few factors militate in favor of a delay to obtain a warrant? Such decisions are difficult to make even in hindsight with time for quiet contemplation. They would be impossible to make in the rush of events that often precede a decision to arrest. We submit that here, as was the case with fresh pursuit, it is advantageous to formulate a rule that holds to a minimum the inevitable areas of gray in which "reasonableness" must be assessed case-by-case.[29]

A rule permitting warrantless arrest entries in most cases, while ordinarily requiring a warrant under clearly defined circumstances (for example, at night), would achieve the degree of certainty necessary to notify officers of what is expected of them and to make the exclusionary rule an effective deterrent to misconduct.

D. EVEN IF THE COURT ADOPTS A PRESUMPTIVE RULE IN FAVOR OF WARRANTS, THE ARREST OF SANTANA WOULD COME WITHIN THE EXCEPTIONS TO THAT RULE

If the Court not only rejects the common law practice of warrantless arrest entries but also adopts the *Dorman* approach, it will then have to decide whether a warrant was required in this case. We have argued at pages 23–29, *supra*, that even if warrants ordinarily are required for arrest entries, there should be exceptions for arrest entries in the hours immediately after the crime and for entries in which the officers

[29] See pages 25–29, *supra*.

are following the suspect from a public place into a private place. Both of these justifications, which can conveniently (if somewhat misleadingly) be called "hot pursuit," are present here.

What is more, most of the countervailing factors enumerated in *Dorman* itself support the entry into Santana's vestibule. The district court found (Pet. App. 3a) that the crime involved here was a "grave" offense rather than a "complacent" one, satisfying the first factor listed in *Dorman* (435 F. 2d at 392). The court concluded that there was "strong probable cause" to arrest Santana (Pet. App. 3a). There was, of course, absolute certainty that Santana was on the premises to be entered. The officers were aware of the likelihood that, if Santana learned of McCafferty's arrest, respondents would have escaped or destroyed valuable evidence. No force was involved in the entry, which was made during daytime hours. The only *Dorman* factor militating in the opposite direction is the absence of a clear indication that respondents were armed. While the officers did not know whether respondents were armed, it would not have been unreasonable for the officers to have assumed that respondents, like many participants in the narcotics trade, either were armed or could acquire weapons rapidly. In sum, it would have been reasonable for Officer Gilletti to have concluded that his proposed course of action was consistent with the criteria set out in *Dorman*.[30] The entry was therefore reasonable,

[30] The officers' actions in the instant case also are consistent with the additional factors we enumerated at note 28, *supra*: (1) There was no advance opportunity to obtain a warrant for Santana's arrest; (3) there was minimal likelihood of intruding upon the privacy of third parties; (4) there was an offense ongoing at the time of the arrest; (10) there was no ulterior motive to search the entire premises; (15) respondent Santana was arrested in her own home. The only factor militating against the arrest was (2)—that it was made in a residence rather than in some less private place. But even that is compensated for by the fact that Santana had exposed herself to public view by standing in her doorway.

and the evidence seized incident to that arrest was admissible in evidence.

E. EVEN IF THE OFFICERS SHOULD NOT HAVE FOLLOWED SANTANA INTO HER VESTIBULE, THE EVIDENCE SEIZED INCIDENT TO HER ARREST SHOULD NOT BE SUPPRESSED

The plurality in *Coolidge* was concerned about the invasion of privacy created when officers entered a house, without a warrant, in order to search for someone whom they had probable cause to arrest if they should find him. The concern was about privacy of place, rather than privacy of person. If that is so, then even if the officers should have obtained a warrant before pursuing Santana into her vestibule, the evidence they seized incident to her arrest should not have been suppressed. The evidence was not a fruit of an invasion of the privacy of Santana's residence. The evidence was seized, instead, as a result of the arrest. It would equally have been seized if the arrest had been made on the street or in the doorway, and it came to be found in the vestibule only because Santana carried it with her as she retreated.

If the Court holds that the officers should have obtained a warrant, it would follow that the prosecution

could not make use of things found in plain view in the interior of the house or otherwise within the area of permissible search under the doctrine of *Chimel*. But the exclusionary rule logically should require the exclusion only of those things that were within the privacy of the house, and the seizure of which was attributable to the fact that the officers were in a place where they should not have been. Where, as here, the seizure was a fruit of the arrest directly (the marked money was recovered from Santana's person, and the heroin from a bag she was carrying), rather than of the fact that the arrest occurred in a private place, the exclusionary rule has no proper role to play. The heroin and money should be admissible in evidence.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-19

UNITED STATES OF AMERICA, *Petitioner*

v.

DOMINGA SANTANA AND WILLIAM ALEJANDRO

BRIEF FOR RESPONDENT, DOMINGA SANTANA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) 4, 5

Wolf v. Colorado, 338 U.S. 25 (1949) 4

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963) 6

COUNTER-STATEMENT OF THE CASE

The respondent was arrested by officers of the Philadelphia Police Department inside her residence at 2311 North Fifth Street, Philadelphia, Pennsylvania. At all times relevant to the consideration of the issues raised herein, respondent Santana was inside her residence. The residence can be described as a brick row home with one front doorway and a vestibule immediately inside the front doorway as the residence is entered.

Upon receiving information from Patricia McCafferty that "Mom had the money" at that location (App. 7-8), the officers proceeded to the above described location where respondent was allegedly observed inside the front doorway. The officers identified themselves at the front of the house by announcing "Police" (App. 30-31, 34, 35, 38, 53), but did not state their purpose to respondent prior to their entry into the residence and the arrest of respondent. Although the petition states that the police announced their "identity and purpose" (Petition, p. 10), this misstatement finds no support in the record. When the police arrived outside of respondent's residence in their vehicle, they alighted with guns drawn and identification cards in hand. At this time the respondent turned and *walked* toward the interior of the house (App. 31) with her back to the approaching officers. Although petitioner chooses to characterize respondent's action in turning and walking away from the front door as an attempt to retreat, flee, or evade arrest, nothing in the record supports the conclusion that respondent had knowledge the police sought to arrest her, and that she knowingly attempted to avoid arrest and the trial court so found. On the contrary, it is petitioner's position that one objective of the prompt action taken here was to minimize the possibility that respondent would learn she was sought by the police. If that objective was indeed reasonable, it would be equally reasonable to infer that respondent had no idea what the purpose of the police

might have been when they alighted from their vehicle. In addition, no evidence was introduced which would tend to prove that respondent knew that the men approaching her house were police officers in spite of their alleged announcement of their identity. It was not demonstrated that respondent heard the officers announce that they were police or that she could see any identification in any officers' hands when they alighted from their unmarked van in plainclothes. No evidence was presented to prove how far the officers were from the respondent when the identification was displayed. On the contrary, testimony from the officers was to the effect that there was shouting and hollering simultaneous to the alleged announcement of identity (App. 30, 35).

Respondent presented evidence that the officers failed to identify themselves, did not display badges or other forms of identification, had only guns in their hands and told those persons sitting on the steps outside the front door of respondent's house to "freeze" (App. 55-63).

ARGUMENT

I. The Warrantless, Unconsented Arrest of the Respondent, Santana, Inside Her Home and the Seizure of Evidence at that Time Was Unreasonable and Unlawful Under all of the Circumstances, and Evidence Seized at the Time of Arrest Was Properly Suppressed by the Trial Court.

A. *Police Officers Must Have an Arrest Warrant Before Entering a Residence to Arrest a Suspected Felon Therein.*

The issue before this Court is whether the police acted unreasonably, and in violation of respondent Santana's Fourth Amendment constitutional rights, when they proceeded, for the purpose of arresting respondent, to enter her residence without a warrant or consent and arrested her therein.

To the best of respondent's knowledge, this Court has not directly passed on this issue although the question has been the subject of discussion in a number of previous decisions. Justice Harlan, in *Jones v. United States*, 357 U.S. 493, 78 S.Ct. 1253 (1958), noted that "whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought' raises a 'grave constitutional question'." *Id.*, 357 U.S. at 499-500, 78 S.Ct. at 1257. This Court also discussed the issue of warrantless entries into residences by police officers to make arrests in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971). Although this Court found it unnecessary to decide the question, it did address it in its plurality opinion, where it stated:

> "It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on

probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.'" *Id.* at 477-478.

The entry of police officers into a home represents the most serious type of governmental intrusion into one's privacy. That the Founding Fathers were concerned with breaches of privacy in one's house is evidenced by the fact that "houses" are the only *places* specifically protected by the Fourth Amendment. It was precisely this sort of intrusion that the Fourth Amendment was designed to circumscribe by the general requirement of a *judicial* determination of probable cause. *Agnello v. United States*, 269 U.S. 20, 32-33 (1925); *Johnson v. United States*, 333 U.S. 10, 14 (1948); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949); *Dorman v. United States*, 140 U.S. App. D.C. 313, 435 F.2d 385, 389-390 (1970). Freedom from intrusion into the house or dwelling is the archetype of the privacy protection secured by the Fourth Amendment. *Agnello v. United States, supra.*

The Fourth Amendment does not distinguish between searches and seizures. Indeed, it is clear that by referring to the seizure of persons, the Fourth Amendment was intended to apply to arrest. *Ex Parte Burford*, 3 Cranch 448 (1805).

The distinction between an entry to search and an entry to arrest is slight, for the latter may well be characterized as simply a search for a person rather than a search for things. In *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967), this Court adopted that view and treated an entry to arrest as a search of the dwelling for a person. In addition, the lack of a warrant was excused on the ground that exigent circumstances were present. The plurality opinion in *Coolidge, supra*, 403 U.S. at 480-481

referred to the case of *Warden v. Hayden, supra*, and stated:

> "The case of *Warden v. Hayden* . . . where the court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances."

Although the exigencies which would excuse the lack of an arrest warrant may differ from those supplying the excuse for the lack of a search warrant, there certainly appears to be a requirement that the police demonstrate that exigency prior to making a warrantless entry into a dwelling to arrest. This they have not done and the trial court specifically held to that effect.

Nearly every court which has addressed the issue recently has held that the Fourth Amendment prohibits a warrantless entry into a dwelling to arrest in the absence of sufficient justification for the failure to obtain a warrant. *Dorman v. United States, supra; Vance v. North Carolina*, 432 F.2d 984, 990-991 (4th Cir. 1970); *United States v. Shye*, 492 F.2d 886, 891 (6th Cir. 1974); *United States v. Phillips*, 497 F.2d 1131, 1135 (9th Cir. 1974); *Salvador v. United States*, 505 F.2d 1348, 1351-1352 (8th Cir. 1974); *United States v. Weinberg*, 345 F.Supp. 824, 837-838 (E.D. Pa. 1972), *aff'd in part*, 478 F.2d 1351 (3rd Cir. 1973), *cert. den.*, 414 U.S. 1005 (1973); *United States v. Rodriguez*, 375 F.Supp. 589, 593 (S.D. Tex. 1974), *aff'd* 497 F.2d 172 (5th Cir. 1974) *Huotari v. Vandenport*, 380 F.Supp. 645, 649-651 (D. Minn. 1974).

The law is clear that when police enter a home to search for a person or for evidence or fruits of crime, the preferred method of proceeding is to obtain a warrant.[1]

1. See, *e.g. Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *Katz v. United States*, 389 U.S. 347, 356-357, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967); *Camara v. Municipal Court of*

This Court has recognized the increasing importance of the need for warrants. *Chimel v. California*, 395 U.S. 752, restricted the scope of a search of premises that was permissible without a warrant to the area immediately within the control of the suspect which might yield dangerous instrumentalities or aid in escape. In *Camara v. Municipal Court*, 387 U.S. 523, this Court held that searches incident to administrative inspections are subject to the warrant requirement, reversing its previously held position.

With respect to state law, the courts of Pennsylvania have not directly confronted the issue of warrantless entries into residences to arrest. In *Commonwealth v. Bosurgi*, 411 Pa. 56, 190 A.2d 304 (1963), (cited by petitioner for the proposition that "warrantless arrest entries" constitute valid police action, Brief, p. 40), the Supreme Court of Pennsylvania merely addressed itself to the specific facts and circumstances in that case, which did *not* include a warrantless entry by police officers into a dwelling to effect an arrest of a suspect therein. Rather,

Footnote 1—(Continued)
City and County of San Francisco, 387, U.S. 523, 528-529, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967); *United States v. Ventresca*, 380 U.S. 102, 105-106, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965); *Beck v. Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 13 L.Ed. 2d 142 (1964); *Aguilar v. Texas*, 378 U.S. 108, 110, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); *Preston v. United States*, 376 U.S. 364, 367-368, 84 S.Ct. 881, 11 L.Ed. 2d 777 (1964); *Wong Sun v. United States*, 371 U.S. 471, 481-482, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); *Chapman v. United States*, 365 U.S. 610, 614-617, 81 S.Ct. 776, 5 L.Ed. 2d 828 (1961); *Jones v. United States*, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960); *Jones v. United States*, 357 U.S. 493, 498, 78 S.Ct. 1253, 2 L.Ed. 2d 1514 (1958); *Giordenello v. United States*, 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L.Ed. 2d 1503 (1958); *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951) *McDonald v. United States*, 335 U.S. 451, 454-456, 69 S.Ct. 191, 93 L.Ed. 153 (1948); *Trupiano v. United States*, 334 U.S. 699, 705, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948); *United States v. Lefkowitz*, 285 U.S. 452, 464, 52 S.Ct. 420, 76 L.Ed. 877 (1932).

the court limited its holding to the question of whether probable cause existed to arrest the defendant, a burglary suspect, without a warrant *"in a taproom* directly across the street from the burglarized store." *Id.*, 190 A.2d at 311 (emphasis added). The court held "[U]nder these and all the attendant circumstances we agree with the majority of the Superior Court that 'the officer had probable cause and reasonable grounds to believe that [Bosurgi] had committed the crime and to arrest the defendant.'" *Id.*, 190 A.2d at 311. Likewise, in *Commonwealth v. Rush*, — Pa. — , 326 A.2d 340 (1974) the Pennsylvania Supreme Court merely decided that information in the hands of the police officers concerning a co-defendant's statement which implicated the suspect in a crime was sufficient to supply the necessary probable cause for a warrantless arrest. The question of warrantless entries into residences by police officers to effect arrests was not presented in the case of *Commonwealth v. Hughes*, 219 Pa. Super. 181, 280 A.2d 556 (1971). There the court considered only whether probable cause existed for a warrantless arrest and neither the entry by the police officers nor the arrest took place inside the residence of the arrestee.

That the respondent was observed by the arresting police officers standing inside the doorway of her house just prior to her arrest does not negate her right to privacy An arrest in itself "is a serious personal intrusion," *United States v. Watson*, — U.S. —, No. 74-538, decided January 26, 1976, 18 Cr. L. 3051, 3056, regardless of whether the arrestee could be seen from a public place just prior to the arrest. Would respondent's right to privacy in her home be any the less if she were observed at a window on the second floor of her home or lived in a glass house? Whether or not a person is visible from a public place should not be the determining factor in deciding whether she has waived her right to be secure in her home against "a serious personal intrusion", *Id.*, such as an arrest. The privacy right with respect to seizure of a person in her

home is directed not to protecting a person from view or discovery but to protection against the "serious personal intrusion," *Id.*, of arrest and deprivation of liberty without an advance judicial determination "by a neutral and detached magistrate," *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

B. *No Exigent Circumstances Existed to Excuse the Requirement that Police Officers Must Have an Arrest Warrant Prior to Entering a Residence for the Purpose of Placing a Suspected Felon Under Arrest Therein.*

On the facts of this case it is clear that the arresting police officers intended from the inception of their operation to enter respondent Santana's residence immediately after the successful completion of the drug "buy" by Officer Gilletti, to arrest her therein and to then conduct a search for alleged marked money used in the drug transaction. A "back-up team" was assembled to trail undercover Officer Gilletti "to find where we buy the dope and make an arrest from there if that was the case." (App. 7, 13, 37, 44). No plans were made to secure either an arrest or search warrant because "[T]here wasn't time" and the officers allegedly weren't sure of the location of the buy (App. 43). Neither of these conclusions by the officer finds support in the record and the trial court found that "under the circumstances the court believes that a warrant could have been obtained for either a search or arrest (Pet. App. 5a).

The trial court also considered whether exigent circumstances existed which would justify dispensing with the warrant requirement and found that no such circumstances existed (Pet. App. 4a-5a).

In ordering the suppression of evidence, the trial court reaffirmed the well-established rule that a warrantless arrest, search and seizure of a person in his home is unlawful absent exigent circumstances which would excuse the warrant requirement. *United States v. Rubin*, 474 F.2d 262 (3d. Cir. 1973); *Dorman v. United States, supra.* Because the United States was unable to point to facts in the instant case to establish the exigent circumstances normally recognized as necessary to dispense with the warrant requirement, it asked the Court of Appeals for the Third Circuit to approve a "new" exigent circumstance —the mere fact that the crime alleged involved narcotics.

Exigent circumstances may vary from case to case and must be considered in light of the special necessities of each case. Courts have recognized certain circumstances which have seemed relevant:

> "(1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge 'that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic'." *United States v. Rubin*, 474 F.2d 262, 268-269. (Citations omitted).

As to the first circumstance, the trial court's opinion finds that "a warrant *could* have been obtained for either a search or an arrest." (Pet. App. 5a). While the United States cannot point to *any* effort by the police to obtain a warrant, it claimed in its brief in the Court of Appeals that it would have been too much trouble to seek a warrant at that hour because the judge at the Police Administration Building, which is only a few minutes drive from the dwelling at 2311 North Fifth Street, *might* be "taking a break" or "involved in a hearing." The record does not

reveal any effort to ascertain whether this imagined obstacle *in fact* existed, or that this was a consideration of the officers at the scene in deciding not to try to get a warrant. Judges are on duty twenty-four hours a day, seven days a week, at the Police Administration Building, conducting preliminary arraignments and setting bail for defendants which take only a few minutes for each case. It is normal procedure for police to seek judges at the Police Administration Building to authorize search and arrest warrants. A normal delay of an hour or two to obtain a warrant under the circumstances of this case would not have prejudiced the Government where no facts existed to support a belief that the defendant knew or could have learned McCafferty had been arrested or that her own arrest was imminent, or that she would destroy evidence or flee. That delay may be encountered is not controlling on whether a warrant is required; securing a warrant always involves some additional time. In this respect this case is distinguished from *United States v. Rubin, supra,* where the police had personal knowledge that an attempt to tip off the possessors of the contraband had been made, thus making an attempt to flee or destroy evidence a *strong likelihood.*

As to the second circumstance set forth in *Rubin, supra,* the record simply does not contain facts to support a "reasonable belief" that contraband was about to be removed. In this regard, the trial court made the following finding:

> "The [marked] money was found in the Defendant Santana's pocket as opposed to any other surreptitious location within the house under a floorboard or behind a picture or dispersed through other persons. The presence of the money in Defendant Santana's pocket *indicates that there was no basis to conclude that it was to be destroyed.*" (Pet. App. 4a, emphasis added).

There is no allegation that the third circumstance set forth above, danger to the police, was involved in this case.

As to the fourth circumstance of *Rubin, supra,* the police possessed no information indicating the defendant was aware that the police were on her trail, as contrasted to the situation in *Rubin, supra,* where one of the defendants actually knew the police were about to arrest him and may have successfully communicated with the other defendants. The Government claimed in the Court of Appeals that, "[I]t is reasonable to *assume* that word of [McCafferty's] arrest would quickly get back to Santana," Brief, p. 14, (emphasis added), however, the circumstances of McCafferty's arrest belie this assumption and the trial court found that there "was no evidence that there was a need to prevent the escape of either defendant" (Pet. App. 4a). McCafferty, the unwitting go-between, was driven to the area of the "buy" by an undercover officer in his unmarked automobile. After the drug buy was allegedly consummated, she returned to the same unmarked automobile. Obviously unaware that she was obtaining drugs for the police, she turned the drugs over and was placed under arrest at that time. Her arrest was certainly not a matter of public knowledge and there certainly was no reasonable basis to conclude that word of her arrest by an undercover officer in an unmarked automobile would spread. Furthermore, if the police were really concerned about the arrest of McCafferty coming to the attention of the respondent while they attempted to obtain a warrant, the arrest of McCafferty could have been effected at some location farther removed from the scene of the alleged crime, or even at the Police Administration Building, without any adverse consequences to the operation.

For the same reason, reliance by the United States on the fifth circumstance is misplaced. If it was impossible or at least unlikely that Santana would discover McCafferty's arrest, it is equally unlikely that she would destroy or dispose of any remaining contraband or other evidence in

her possession. Even assuming, *arguendo*, Santana learned of the arrest somehow, there would have been no additional reason for her to conclude that her arrest or a search of her residence would be a natural consequence of McCafferty's arrest.

This case is clearly distinguishable from *United States v. Davis*, 461 F.2d 1026 (3d Cir. 1972), cited by petitioner in the Court of Appeals, where the agents had last-minute information that suspects had received a drug shipment and were in the process of "cutting" the drugs. The agents, operating with the knowledge that "it takes only about fifteen minutes to 'cut' an ounce of heroin and prepare it for retail sale," *Davis, supra*, 461 F.2d at 1631, and that the nearest issuing authority was forty-five minutes away, proceeded immediately to the apartment of the defendants. In the instant case, there was no specific information which would indicate the police had only minutes to act. Moreover, in *Davis, supra*, the agents were responding (with "only short notice," *Davis, supra*, 461 F.2d at 1631) to information which required *immediate* action while in this case the police had embarked upon a pre-planned operation in which adequate arrangements could and should have been made to situate a member of the team near an issuing authority so that any delay in obtaining the warrant could have been minimized. Another very reasonable alternative would have been for the police to have brought a blank warrant form with them so that one of their numbers could proceed immediately and directly to the Police Administration Building, which is only a *few-minutes* drive from the scene of the alleged transaction. Thus, reasonable alternatives to minimize the danger of delay could have been implemented for this pre-planned operation without unduly encumbering the police operation. These alternatives could have been built into the operation in advance and are suggested not because the defendant believes a delay of an hour or two would have been unreasonable under the circumstances but because the period of delay

may well have been reduced to less than an hour if the officers had made a reasonable effort to plan for the need for the warrant.

The trial court found that, "[T]here was strong evidence that the defendant was on the premises. She was seen there and it was known that this was her premises that she either owned or occupied." (Pet. App. 3a). The Government does not contend that she was outside her house, but that she was in the vestibule inside her doorway when the police rushed at the house with guns drawn.

C. *The Arresting Police Officers Failed to State Their Purpose or Demand Admission Prior to Entering Respondent's Residence to Arrest Her Therein.*

Assuming *arguendo* that there was no necessity to obtain an arrest warrant prior to entry into respondent's residence, the method of entry by the arresting officers in not announcing their purpose or demanding admission offended federal constitutional standards of reasonableness and state law and therefore vitiated the lawfulness of her arrest.

Testimony at the pre-trial suppression hearing was contradictory. Santana's daughter and daughter-in-law testified that the police officers failed to identify themselves or state their purpose and that the approach of the officers with guns drawn appeared to be a robbery (App. 56-63). The officers testified that they alighted from their unmarked van wearing civilian clothes with their weapons drawn. One officer shouted "police" and held his identification in his hand (App. 30-31, 34, 35, 38, 53). At that point Santana "turned and *walked* back towards the house" (App. 31, emphasis added). The officers followed through the front door and apprehended Santana as she was leaving the vestibule and about to enter her living room (App. 31). Although the conflict in the testimony is substantial, even if the petitioner's version is accepted as totally true,

it has failed to establish that the officers announced their purpose or demanded admission prior to barging into the residence. Furthermore, no exigent circumstances existed which justified the failure of the officers to announce their purpose prior to entry and demand admission.

In *United States v. Miller*, 357 U.S. 301, this Court addressed itself to a factual situation in which officers without a search or arrest warrant "did not expressly demand admission or state their purpose for their presence, nor did they place the petitioner under arrest until after they entered the apartment." *Id.*, 357 U.S. at 304. The Court held that "[T]he petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose." *Id.*, 357 U.S. at 313. The announcement in the instant case was no greater than that in *Miller, supra*, where plainclothes officers without a warrant knocked on the door of a suspect's apartment and upon his inquiry, "Who's there?", replied in a low voice, "Police". The suspect opened the door but quickly tried to close it, whereupon the officers broke the door, entered, arrested the suspect and seized marked bills which were later admitted as evidence over defense objection. The officers had no arrest or search warrant. They did not expressly demand admission or state their purpose for their presence, nor did they place the suspect under arrest until after entering the premises. The officers acted on the basis of information received from an informant in their custody that the suspect was engaged in unlawful drug sales. Their plan, as in the instant case, was to set up a buy through an unwitting intermediary using marked money. The intermediary was dispatched to make the "buy" with the officers following in a taxicab. The officers observed the intermediary enter the suspect's premises then leave, whereupon they apprehended him and were told how and where the illegal transaction took place. The officers returned to the suspect's apartment and effected the arrest.

The only distinction between *Miller* and this case is that in this case the door was open when the police officers charged into the residence with guns drawn. The fact remains, however, that the intrusion was non-consensual, completely unauthorized and at gunpoint, i.e., forcible.

The Commonwealth of Pennsylvania has adopted the federal constitutional standard as its own. In *Commonwealth v. Clemson*, — Pa. Super. — , 338 A.2d 649 (1975), the Pennsylvania Superior Court reiterated the "well-established" rule "that police officers are required to give notice of their identity and purpose before attempting to enter private premises." *Id.*, 338 A.2d at 650. In *Clemson*, the police entered defendant's apartment with a passkey provided by the manager of the apartment house after there was no response to knocking on the door and announcing, "police, we have a search warrant." The Court stated that:

> "The fact that the police were in possession of a passkey and did not have to resort to physical force in order to gain entry does not make their intrusion any less 'forcible.' In *Sabbath v. United States*, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed. 2d 828 (1968), the Supreme Court held that the use of 'force' is not an indispensable element of the federal announcement statute."

The mere fact that the door to the house was open when the police officers charged into the house with guns drawn is not tantamount to an invitation or consent to enter. The "force" here involved was an assault on the house with guns drawn.

The failure of the police officers to make the necessary announcement prior to entry is a violation of respondent's Fourth Amendment right to be free from unreasonable searches and seizures.

CONCLUSION

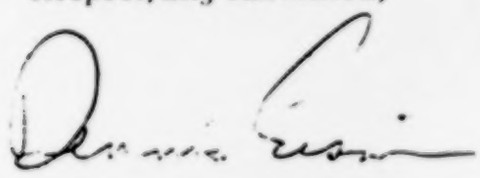
Freedom from intrusion into the house or dwelling is the archetype of the privacy protection secured by the Fourth Amendment. See *Agnello v. United States, supra*:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right to privacy must reasonably yield to the right of search is as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

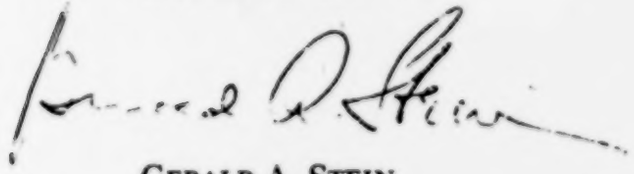
Under all of the circumstances, it is clear that the warrantless, non-consensual entry without proper announcement into the respondent's dwelling was an unreasonable intrusion violative of the Fourth Amendment and the arrest which ensued thereafter was unlawful. The trial court properly ordered the fruits of this unlawful, unreasonable entry and the arrest suppressed, and the Court of Appeals correctly affirmed the ruling of the trial court. No exigent circumstances excused the requirement that the police obtain a warrant or that they announce their purpose and demand entry. The exigent circumstances asserted by the Government are not supported by the evidence and are based wholly upon speculation and assumption, not facts. The attempt to characterize the respondent as not being in her house fails since she was at all times on the premises. The police could have obtained a warrant with minimal effort and delay merely by considering it as part of their total plan and bringing the proper forms with them or placing an associate in proximity to an on-duty issuing authority. The need for a warrant was reasonably foreseeable where they planned in advance to set up a "buy" at the respondent's home and make an arrest and knew that the respondent would be present and the exact address. Moreover, even a delay of an hour or two would not have been unreasonable absent any factual basis for believing the respondent would flee from her own home or that she knew of McCafferty's arrest by undercover police and would destroy evidence.

For all of the above reasons, respondent, Dominga Santana, prays this Honorable Court affirm the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,



DENNIS H. EISMAN



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Supreme Court, U. S.
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No. 75-19

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

DOMINGA SANTANA AND WILLIAM ALEJANDRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

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1. Respondent Santana argues that the entry into her vestibule to arrest her was unlawful because the officers failed to announce their purpose and demand admittance before entering. We briefly recapitulate the facts pertinent to that contention.

Moments before police approached her house, Santana had sold a "bundle" of heroin to Patricia McCafferty, who in turn sold it to an undercover officer. McCafferty was arrested immediately after the second sale. She told police that Santana had the purchase money (App. 7-8, 29-30, 42). The officer who arrested McCafferty gave a signal (indicating a successful purchase) to surveillance officers. Those officers drove the short distance to Santana's house and got out of the van with their guns drawn. The officers testified that one officer displayed his badge and identification card and shouted "police" as he approached the house (App.

30-31, 34, 35, 38, 53). Santana, who was standing in the open doorway holding a brown paper bag in her hand, turned and retreated into the vestibule (App. 31, 35, 38, 41, 53). The officers followed her through the door, which she left open, and arrested her in the vestibule.

a. In *Miller* v. *United States,* 357 U.S. 301, the Court endorsed the commonlaw rule that requires law enforcement officers to announce their identity and purpose before they "break the door of a house to effect an arrest" (*id.* at 306-307; footnote omitted). The Court repeatedly emphasized that it is the forcible entry—the breaking—that the rule is designed to prevent. *Id.* at 306-311, 313-314. The record here discloses, without contradiction, that the officers did not force their way into the house. They went in through an open door. In fact, they encountered no obstacle in entering, either from an external barrier or from the people inside the house. Nor did they surprise an occupant within or, for example, rudely awaken someone slumbering in an upstairs bedroom. Respondent Santana was fully aware that the officers were approaching. Because the entry in this case involved neither surprise nor force,[1] the common law rule requiring an announcement is simply not applicable.

Santana argues (Br. 15) that an announcement must precede any entry, whether or not forcible, citing *Sabbath* v. *United States,* 391 U.S. 585. But *Sabbath* involved an unannounced opening of an unlocked door. That entry involved both surprise to those within the

[1]There is nothing to Santana's claim (Br. 15) that the officers' approach with guns drawn constituted "an assault on the house." There is no indication in the record that the guns were drawn as part of an effort to invade the house; only Santana's retreat caused the entry into the vestibule.

dwelling and the application of some sort of physical exertion by the officers—beyond just walking in—to gain entry. As the Court emphasized (391 U.S. at 590):

> An unannounced intrusion into a dwelling * * * is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or, as here, open a closed but unlocked door.

Conspicuously absent from the list is the central feature of this case: entry through an open door.[2] The courts of appeals that have considered the question have held that entry through an open door requires no announcement. See, *e.g., United States* v. *Morell,* 524 F.2d 550, 556 (C.A. 2); *United States* v. *Lopez,* 475 F.2d 537, 540-541 (C.A. 7); *United States* v. *Johns,* 466 F.2d 1364 (C.A. 5); *United States* v. *Conti,* 361 F.2d 153 (C.A. 2), vacated on other grounds, 390 U.S. 204; *United States* v. *Williams,* 351 F.2d 475 (C.A. 6); *United States* v. *Hassell,* 336 F.2d 684 (C.A. 6), certiorari denied, 380 U.S. 965.[3] Cf. *United States* v. *Bradley,* 455 F.2d 1181,

[2]In a footnote to the passage quoted above, the *Sabbath* Court observed that "[w]e do not deal here with entries obtained by ruse, which have been viewed as involving no 'breaking.' " Ruse entries, like the entry here, characteristically involve armed officers walking in through doors that are open.

[3]The District of Columbia Circuit, alone among federal courts, has held that officers must announce their authority and purpose before entering through an open door. *Hair* v. *United States,* 289 F.2d 894. This case has been explicitly rejected by other courts of appeals. See, *e.g., Ng Pui Yu* v. *United States,* 352 F.2d 626 (C.A. 9). It also appears to be inconsistent with the language of 18 U.S.C. 3109 and unsupported by the rationales for such a rule. See generally Note, *Announcement in Police Entries,* 80 Yale L. J. 139 (1970), and Blakey, *The Rule of*

1185-1186 (C.A. 1), affirmed, 410 U.S. 605. Other cases are collected in Annotation, 21 A.L.R. Fed. 820, 881-884 (1974). These cases are consistent with the language of 18 U.S.C. 3109, upon which the federal announcement requirement is based. That statute provides that an "officer may break open any outer or inner door or window of a house" in order to make an authorized search or arrest. *Sabbath* held that the unannounced opening of a closed door is a "breaking" of that door. But there can be no "breaking," or anything resembling a "breaking," when officers simply enter through a completely open door and arrest in the vestibule a person who observed the officers' approach.[4]

b. It has always been the rule that if a person who has been arrested escapes and is chased in hot pursuit, the pursuing officers need not pause even at the closed door of a building to announce their authority and purpose. See *Ker* v. *California,* 374 U.S. 23, 54-55 (opinion of Brennan, J.). The eight Justices who expressed a view on the matter in *Ker* agreed that when the exigencies of a situation call for prompt action, or when

Announcement and Unlawful Entry: Miller v. *United States and Ker* v. *California,* 112 U. Pa. L. Rev. 499 (1964), which discuss the common law rule of announcement. The rule was thought necessary to protect inhabitants of a house from useless violence that could be avoided by a voluntary opening of doors. See *Lee* v. *Gansell,* [1774] Lofft's 374, 381. Cf. 2 Hale, *Pleas of the Crown* 90 n. 8 (1847). An entry through an open door is not the sort of violent, obnoxious and dangerous act with which the courts were concerned. See *Jones* v. *United States,* 336 A.2d 535, 538 (D.C. Ct. App.), certiorari denied, December 1, 1975 (No. 75-5383) (no announcement needed for officers to push open door partially opened by occupants); *United States* v. *Syler,* 430 F.2d 68, 70 (C.A. 7) (same). To the extent the announcement rule is rooted in concern for an individual's right of privacy in his own house, it serves only to delay entry for a few moments. It never prevents entry. An occupant who sees officers approaching an open door has no legitimate interest in securing such a momentary respite from entry. See also pages 17-19 of our main brief.

[4]Pennsylvania has a rule similar to 18 U.S.C. 3109. Pa. R. Crim. P. 2007(a) provides that an officer executing a search warrant shall,

an announcement would be superfluous, none need be made.[5] That rule should apply with equal force to an arrest made in fresh pursuit without the element of escape from custody. The same justifications that, we have argued (Br. 21-30), support a prompt and warrantless entry to make an arrest also should be sufficient to support an entry through an open door in pursuit of a retreating person, without formal announcement of purpose and demand to enter. See *Vanella* v. *United States,* 371 F.2d 50, 58 (C.A. 9), certiorari denied, 386 U.S. 920 (no announcement is required to enter through an open door in fresh pursuit); *United States* v. *Bustamante-Gamez,* 488 F.2d 4 (C.A. 9), certiorari denied, 416 U.S. 970 (no announcement is required to enter through a closed door in hot pursuit); *United States* v. *Mapp,* 476 F.2d 67 (C.A. 2) (any announcement in a fresh pursuit situation can dispense with a statement of purpose and demand to enter). Cf. *Miller* v. *United States, supra,* 357 U.S. at 310.

"before entry, give, or make a reasonable effort to give, notice of his identity, authority and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require his immediate forcible entry." Pennsylvania courts have followed federal precedents interpreting Section 3109 in construing the state rule. See, *e.g., Commonwealth* v. *Clemson,* 234 Pa. Super. 740, 338 A.2d 649. In particular, they have interpreted this rule and earlier state rules as requiring a suitable announcement prior to a "forcible" entry. See, *e.g., Commonwealth* v. *DeMichel,* 442 Pa. 553, 561; *Commonwealth* v. *Easton,* 231 Pa. Super. 398, 332 A.2d 448; *Commonwealth* v. *Mazzella,* 231 Pa. Super. 247, 331 A.2d 784. Our research has not disclosed any Pennsylvania case dealing with entry through an open door. We do not believe, however, that Pennsylvania courts would interpret Pa. R. Crim. P. 2007(a) to require an announcement not required by 18 U.S.C. 3109.

[5]See also *Wong Sun* v. *United States,* 371 U.S. 471, 483-484; *Miller* v. *United States, supra,* 357 U.S. at 309; *Read* v. *Case,* 4 Conn. 166; ALI, *A Model Code of Pre-Arraignment Procedure* 310-313 (1975) (Reporters' notes to §120.6, which allows warrantless arrest entries).

c. Assuming that some sort of announcement is required in a case like this one, we believe that the display of identity cards and the shout of "police" is sufficient to alert a person who can see the onrushing officers that entry is demanded. A more formal demand to enter would be superfluous and, in light of the possibility of flight, destruction of evidence, and the like if the officers had paused at the threshold to await permission to enter, should not be required.[6]

Although, as we have indicated, the arresting officers testified that they displayed their identity cards and shouted "police," Santana's daughter and daughter-in-law testified that the officers did not identify themselves (App. 56-63). The district court did not resolve this conflict in the testimony, and neither the district court nor the court of appeals has considered whether, if an announcement was required, an adequate announcement was made. If this Court should hold, contrary to our arguments, that some announcement was necessary, it would be appropriate to return this case to the district court so that it can make the pertinent findings of fact.

2. In *Scher* v. *United States,* 305 U.S. 251, a case not discussed in our opening brief, this Court held that officers acted reasonably in making a warrantless entry into, and warrantless arrest in, a garage. We submit that *Scher* supports the arguments we have made in this case. In that case, officers had probable cause to believe that Scher was transporting illegal distilled spirits in his car. They followed Scher's car as it made stops at several places and as it returned to his own residence. Scher "turned into a garage a few feet back of his

[6]Several courts of appeals have approved brief announcements similar in content to the one the officers testified they gave in this case. See, *e.g., United States* v. *Wysong,* 528 F.2d 345, 347 (C.A. 9) ("Federal Agents, open up"); *United States* v. *Squella-Avendano,* 447 F.2d 575, 577 (C.A. 5) ("Police. Open the door"). Cf. *United States* v. *Manning,* 448 F.2d 992, 1001 (C.A. 2) (*en banc*), certiorari denied, 404 U.S. 995. If notice of this sort is sufficient when the door is closed, a simple shout of "police" and a display of identification should be sufficient when the door is open and the occupant is in a position to see the identification.

residence and within the curtilage. One of the pursuing officers left their car and followed. As [Scher] was getting out of his car this officer approached, announced his official character, and stated he was informed that the car was hauling bootleg liquor" (305 U.S. at 253). The officer searched the car, discovered illegal liquor, and arrested Scher. He had neither a search warrant nor an arrest warrant. *Id.* at 253-254.

Scher argued that both the entry into the garage through its open door and his subsequent warrantless arrest were unconstitutional. This Court unanimously disagreed, writing (305 U.S. at 255): "[I]t seems plain enough that just before [Scher] entered the garage the following officers properly could have stopped [Scher's] car, made search and put him under arrest. So much was not seriously controverted at the argument. Passage of the car into the open garage closely followed by the observing officer did not destroy this right. No search was made of the garage. * * * The officers did nothing either unreasonable or oppressive." Similarly, because the police could have arrested respondent Santana as she stood in her doorway (*United States* v. *Watson,* No. 74-538, decided January 26, 1976), her retreat into her vestibule (with the officers close behind) did not destroy their right to arrest her.

3. We have argued (Br. 23-29) that even if the Court does not accept our contention that a chase into the vestibule supports the arrest of Santana, it should interpret the hot pursuit exception to the warrant requirement to allow an entry during the commission of a crime and within a few hours thereafter. The District of Columbia Circuit recently, in the context of a warrantless search of a parked and unoccupied automobile, has accepted our argument that the hot pursuit rationale comprehends official action within a few hours of the

crime, and that a chase is unnecessary. See *United States* v. *Robinson*, C.A. D.C., No. 74-1778, decided October 16, 1975 (*en banc*), opinion filed February 24, 1976, slip op. 11-13, certiorari denied, March 8, 1976, No. 75-5908.

4. The officers knew that Santana had sold heroin to McCafferty only moments before they approached Santana's house. They also had strong reason to believe that Santana still possessed heroin available for distribution. Under those circumstances prompt arrest was not only justified but imperative. Although we believe that the fresh pursuit doctrine is the proper ground upon which to sustain Santana's arrest, it also could be sustained upon an argument that "exigent circumstances" exist whenever a crime is ongoing. As Mr. Justice Marshall recently has observed (*United States* v. *Watson*, *supra*, dissenting slip op. 2): "When law enforcement officers have probable cause to believe that an offense is taking place in their presence and that the suspect is at that moment in possession of the evidence, exigent circumstances exist. Delay could cause the escape of the suspect or the destruction of the evidence." Because the officers reasonably believed that Santana was committing the crime of possession of heroin, and also believed that she possessed evidence (the proceeds) relating to her sale of heroin to McCafferty, they were entitled to arrest her as promptly

as possible, even though this required them to enter the vestibule of her house.[7]

For the foregoing reasons, in addition to the reasons discussed in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[7]Our brief collected (p. 42, n. 23) several cases that have followed *Dorman* v. *United States*, 435 F.2d 385 (C.A. D.C.) (*en banc*), in erecting a presumption that a warrant is necessary to enter a private place to make an arrest. We listed the Ninth Circuit as an adherent to the *Dorman* approach. More recently, however, another panel of the Ninth Circuit has stated that the question remains open there. *United States* v. *McLaughlin*, 525 F.2d 517, 520. On the other hand, a divided Supreme Court of California has joined the three other state courts that now embrace the *Dorman* rule. *People* v. *Ramey*, 127 Cal. Rptr. 629, 545 P.2d 1333. But cf. *Sheff* v. *State*, Sup. Ct. Fla., decided February 25, 1976, 18 Crim. L. Rep. 2551 (warrantless probable cause arrest is upheld and evidence seized from defendant's person is admissible, even on the assumption that the entry into his apartment was unconstitutional).

MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-19

UNITED STATES OF AMERICA,

Petitioner,

vs.

DOMINGA SANTANA and WILLIAM ALEJANDRO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, INC.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc., and The National District Attorney's Association, Inc., respectfully move this Court for leave to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; Counsel for the respondents have not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. Consent of counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

The National District Attorneys Association (NDAA) is a nonprofit, nonpolitical, tax exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the National District Attorneys Association are, *inter alia,* to improve and to facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an Amicus Curiae Committee to file briefs in cases of national importance in the United States Supreme Court. The NDAA seeks to make known the views of all prosecutors in America and to bring before this Court their position on matters affecting the discharge of the duties of prosecutor.

Amici herein have an abiding interest in the effectiveness of law enforcement in this country. This case involves the highly important question of the permissible extent of police activity when law enforcement officers are confronted with exigent circumstances. Thus both *amici* believe that they have a direct interest in the outcome of this case.

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BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER.

ARGUMENT.

I.

This Court Should Define with Reasonable Certainty When "Exigent Circumstances" Exist Which Will Justify Law Enforcement Officers in Proceeding to Make an Arrest or Search Without a Warrant.

Former Justice Clark, in *Chapman* v. *United States,* 365 U. S. 610 (1961), made one of the most trenchant and accurate comments about the courts *vis-a-vis* the police which has ever been spoken. He stated:

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. 365 U. S. at 622. (Dissenting opinion.)

This assessment is accurate. Law enforcement officers across the country *are* called upon more and more to make value judgments as to proper police action, including questions of search and seizure. In fact, in these days of soaring crime rates[1] the statement by Mr. Justice Clark takes on even greater significance, for as more crimes are being committed the police will of necessity find themselves called upon more often to make decisions involving the search for and seizure of evidence of crime.

Justice Clark was equally accurate in his statement that the policeman ". . . is anxious to obey the rules that circumscribe his conduct . . ." in the field of search and seizure. This is evidenced by the facts of the instant case, and is implicit in the opinion of the trial court below, the United States District Court for the Eastern District of Pennsylvania, which is the only written opinion in this case. There the court held that the evidence against Respondent Santana should be suppressed, *but* the court expressly stated that it did not criticize the actions of the police. (Petition of the United States for Certiorari, Appendix Z, page 5A, see also, page 13 below.)

Finally, Mr. Justice Clark stated, "It is the duty of this Court to lay down those rules with such clarity and understanding that [the policeman] may be able to follow them." 365 U. S. at 622. The importance of this assertion cannot be overstated. Certainly the law enforcement agencies of this country, who must deal with rampant and increasing crime on a day-to-day basis, need and deserve from this Court rulings governing their conduct of sufficient *clarity* that they may know with reasonable certainty

1. The Uniform Crime Reports of the F.B.I. indicate that in 1974 serious crime in the United States increased by 18% over the previous year.

what they can and cannot do. And, as Justice Clark noted, such rules should be promulgated with an *understanding* of the realities of police work.

This Court has responded with admirable clarity and understanding in other areas of the law of search and seizure. For example, in *Terry* v. *Ohio,* 392 U. S. 1 (1968), very clear guidelines were laid down by the Court as to what circumstances would justify a "stop and frisk" of criminal suspects. Perhaps the very clear-cut language in *Terry* is the reason that this Court has found it necessary to review police "stop and frisk" procedures in only one other case in the eight years since *Terry* was decided.[2] We point out that "stop and frisk" as defined in *Terry* gave to law enforcement officers a very wide discretion but this discretion was delineated in such a well-drawn opinion that the police know the limits of their discretion with reasonable certainty, hence the relative dearth of litigation on the matter, at least at the level of the Supreme Court of the United States.

In another area of search and seizure, the construction of affidavits for search warrants, this Court, in *United States* v. *Harris,* 403 U. S. 573 (1971), clarified much of the confusion caused by *Aguilar* v. *Texas,* 378 U. S. 108 (1963), and *Spinelli* v. *United States,* 393 U. S. 410 (1969). Additionally, this Court in *Harris* displayed the understanding of the problems of police work, called for by Mr. Justice Clark, by admonishing lower courts to refrain from utilizing "hypertechnical" standards when judging the sufficiency of affidavits made to establish probable cause for search warrants. (403 U. S. at 579.)

We submit that the instant case provides an ideal vehicle for the Court to utilize the same clarity and understanding so apparent in *Terry* and *Harris, supra,* to make reasonably certain the limits of legitimate police conduct in that most problematical of areas: exigent circumstances as a justification for police action in the absence of a warrant.

2. The case was *Adams* v. *Williams,* 407 U. S. 143 (1972).

As the Government has pointed out, because there was, in this case, no written opinion but merely a *per curiam* affirmation of the trial court's order of suppression by the United States Court of Appeals for the Third Circuit, it is difficult to define the precise rationale of the Court of Appeals in affirming. It is not clear from the opinion of the trial court whether the suppression of evidence resulted from the failure of the police to obtain an *arrest* warrant before going to Mrs. Santana's house in the first place or the failure of the police to obtain a *search* warrant before entering her house. The trial court appears to refer to arrest and search warrants interchangably. (See Appendix A to the Petition for Certiorari of the United States in this case.)

What *is* clear is that the trial court refused to hold that the exigencies of the situation in this case—which the court itself characterized as the "extreme emergency posture" of the case—justified the police action taken without a warrant Thus, this case squarely presents the question of "exigent circumstances" as an exception to the warrant requirement.

We state at the outset that we do not quarrel with the proposition that, where it is possible to do so, the police should obtain a search warrant before taking action. *Katz* v. *United States,* 389 U. S. 347 (1967); *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971). We submit, however, that due to the volatile nature of the job of enforcing the criminal law, the number of unknowns which will inevitably occur in police work, and the necessity for quick action in such work, situations will often arise in which a reasonable man would conclude that the police should take immediate action. These are "exigent circumstances."

The *doctrine* of exigent circumstances had long been recognized in the jurisprudence of search and seizure, *Johnson* v. *United States,* 333 U. S. 10 (1948); *McDonald* v. *United States,* 335 U. S. 451 (1948), *Warden* v. *Hayden,* 387 U. S. 294 (1967). However, as was pointed out by the United States

Court of Appeals for the Third Circuit in *U. S.* v. *Rubin*, 474 F. 2d 262 (1973), the courts have not in fact delineated exigent circumstances to any great extent.

Courts have spoken to the question of exigent circumstances only on a case by case basis and this has led to a great deal of confusion, particularly to police officers who must make their decision whether or not to act, on the street, and usually in a very short period of time. To illustrate, the Court of Appeals which affirmed, without opinion, the suppression of evidence in the instant case had, in 1973, found that exigent circumstances justified the warrantless search of a garage when a defendant, after his arrest shouted "Call my brother." *U. S.* v. *Rubin*, 474 F. 2d 262 (3rd Cir. 1973). The court in *Rubin* held that the officers could search the garage because they could reasonably conclude that the contraband was in danger of being destroyed even though they did not then *know* it was then being destroyed.

It would appear that the instant case and *Rubin, supra,* both from the same Circuit, are in direct conflict with each other and other courts have been equally at variance; cf. *United States* v. *Curran*, 498 F. 2d 30 (9th Cir. 1974), *United States* v. *Samuels*, 374 F. Supp. 684 (E. D. Pa. 1974); *Delaware* v. *Reader*, 328 A. 2d 146 (Superior Ct. Del. 1974) claim of exigent circumstances upheld; *Lugar* v. *Commonwealth*, 202 S. E. 2d 894 (Va. 1974); *United States* v. *Bradshaw*, 490 F. 2d 1097 (4th Cir. 1974), cert. den. 419 U. S. 895 (1974), *United States* v. *Griffin*, 502 F. 2d 959 (6th Cir. 1974), cert. den. 419 U. S. 1050 (1974) claim of exigent circumstances to justify warrantless search rejected.

We submit that this Court should, in the context of the instant case, define when exigent circumstances will justify a warrantless arrest or search, with the "clarity and understanding" called for by Mr. Justice Clark in his dissent in *Chapman, supra.* Since this case raises principally the issue of exigent circumstances in the context of threatened destruction of contraband or threatened disposal of evidence, we will confine the balance of our argument to this issue.

We respectfully suggest that the resolution of the issues in this case should be based upon the "rule of reason" approach taken by this Court in *Terry* v. *Ohio, supra* and *United States* v. *Harris, supra.* Basically we ask for no more than a holding that if a police officer *subjectively* believes that there is a likelihood that contraband or evidence will be disposed of if he does not take immediate action *and* if, by an *objective* standard (*i.e.* the reviewing court), his belief of potential destruction is reasonable, then the requisite exigent circumstances should be found to exist and a warrantless search should be sustained.

Of course, the officer must first have to have probable cause to believe that the contraband is present, as was clearly the situation in the instant case. Our suggested rule for establishing the existence of exigent circumstances does not lower the standard of probable cause to arrest or search. It is directed solely at the question: *assuming* probable cause exists, when will exigent circumstances justify a warrantless arrest or search.

We believe that the standard which we suggest would be fair to both the officer and the accused. It would give a certain sanction to the officer's subjective belief that contraband or evidence might be disposed of unless he took immediate action, a belief which is very important because the officer is the man on the scene best situated to describe why he felt the exigency existed—a situation which was rejected, albeit reluctantly, by the trial court in the instant case.

Our suggested analysis does not, however, leave the entire determination of the situation to the officer; for, in addition, his subjective belief of threatened destruction must be tested by the objective criterion of reasonableness: was his belief a reasonable one in the circumstances of the case? Thus, the court, hearing the motion to suppress, is the final arbiter of the question, but in making its decision the court would be constrained to take into consideration the belief of the officer or officers involved, measured against a standard of reasonableness.

There is certainly precedent for the two pronged test of the existence of exigent circumstances, which we suggest, to be found in analogous areas of the law. We believe that the holding in *Terry* v. *Ohio, supra,* is, by analogy, directly on point. Mr. Chief Justice Warren, writing for the majority in *Terry* dealt with the subjective state of mind of police officers involved in "stop and frisk" situations. Stating that there should be a narrowly-drawn authority on the part of the police to search for weapons, he continued:

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. 392 U. S. at 27. (Citations omitted.)

Both standards which we suggest, subjective and objective, are clearly set out by Chief Justice Warren. Emphasis is laid on the subjective specific inferences made by the officer ". . . from the facts in light of his experience." *But the inferences must be reasonable.* Likewise, the Chief Justice stated that, in the stop and frisk situation, the officer need not be "absolutely certain" that the individual was armed. Reasonable belief is the test, as it should be, in the exigent circumstances question. The officer in the latter instance should not have to be absolutely certain that evidence or contraband *will* be destroyed; he should need only to be able to articulate specific facts as to why he felt it might be disposed of and then to have these facts tested against an objective standard of reasonableness.[3]

3. In addition to the *Terry* analysis this is also the rationale being taken by the United States Courts of Appeal in cases involving civil rights actions against police officers after *Bivens* v. *Six Unknown Named Narcotic Agents,* 403 U. S. 388 (1971). In such cases "good faith" is a defense to the officer if he can prove that the arrest or search was made (1) in the good faith belief that probable cause for the arrest or search existed, and (2) by an objective standard, this good faith belief was reasonable. *Bivens* v. *Six Unknown Named Narcotic Agents,* 456 F. 2d 1339 (2d Cir., 1972); *Rodriguez* v. *Jones,* 473 F. 2d 599 (5th Cir., 1973), *cert. den.* 412 U. S. 953 (1973); *Hill* v. *Rowland,* 474 F. 2d 1374 (4th Cir., 1973); *Street* v. *Surdyka,* 492 F. 2d 368 (4th Cir., 1974); *Hoitt* v. *Vitek,* 497 F. 2d 598 (1st Cir., 1974); *Tristis* v. *Backer,* 501 F. 2d 1021 (7th Cir., 1974); *Brubaker* v. *King,* 505 F. 2d 534 (7th Cir., 1974); *Boscarino* v. *Nelson,* 518 F. 2d 879 (7th Cir., 1975).

The two-pronged test of the existence of exigent circumstances can be illustrated by the facts of the instant case. In that situation the subjective state of mind of the Philadelphia police officers can be summarized:

1. They had just made an undercover "buy" of narcotics from McCafferty who advised the officers that she was going to Mrs. Santana to obtain the narcotics for sale to the undercover officer, and who told the police after she had returned with the narcotics and had been arrested, that Mrs. Santana had the marked money with which McCafferty bought the narcotics which she in turn had sold to the officer.
2. The arrest of McCafferty had been made on the street about 1½ blocks from Mrs. Santana's residence.
3. The officers involved in the case had probable cause to believe that Mrs. Santana was in possession of narcotics for sale and that she was then in possession of the marked "buy money."
4. Mrs. Santana and Alejeandro could have been apprised of the arrest of McCafferty on the street and could have then disposed of the contraband and evidence involved.
5. Mrs. Santana was then and there engaged in the commission of a felony of a continuous nature. The police, from the record, had no way of knowing whether or not Mrs. Santana might sell all of the narcotics in her possession, get rid of all of the evi-

> dentiary buy money in her possession, in the process of making "change" in sales to others,[4] or get rid of both, if apprised of McCafferty's arrest, before a warrant could be obtained.

These factors, we submit, could well have been those which formed the subjective state of mind of the police surveillance team when they left the scene of the arrest of McCafferty, proceeded directly to Mrs. Santana's house, observed her in public view in front of her house with a paper bag in her hands, and then after identifying themselves and observing her flight into the house, proceeded into the vestibule, arrested her and seized the heroin and money from her person.

Objectively viewed, could this state of mind of the police have been unreasonable? If we analogize to the statements of Chief Justice Warren in *Terry* v. *Ohio*, quoted above at p. 10 of this brief, we submit that it would *not* be unreasonable in the circumstances for the police to believe that the contraband and evidence, which they had probable cause to believe was in the possession of Mrs. Santana, might have been disposed of in the time it would have taken them to obtain either an arrest warrant or search warrant.

In *Terry* it was held that the officer approaching a suspect did not have to be "absolutely certain" that that suspect was armed in order to initiate a "stop and frisk." The criterion in *Terry* was, rather, "specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience." 392 U. S. at 27. By analogy, the Philadelphia police officers should not have been required to be "absolutely certain" that the evidence and contraband in the possession of Mrs. Santana would be disposed of, only that they could reasonably infer, based upon their experience, that it might have

4. The fact that when the police arrested Mrs. Santana she had only $70.00 of the $110.00 "buy money" given her by McCafferty indicates that this could have been a well-founded apprehension on the part of the police.

been disposed of, thus creating the requisite exigent circumstances which would justify their proceeding without a warrant.

The trial court conceded, in its opinion, the very close nature of the instant case, stating:

> This court believes it is a very close case and the court understands also that *under the extreme emergency posture of a case like this where many unknown events are occurring, police officers oftentimes have difficult decisions to make* and it is much easier for a court on reflection to analyze and pick apart or even indeed criticize, which this court is not doing, the action of the police in this case. (Petition for Certiorari of the United States, Appendix A at page 5.) (Emphasis supplied.)

Nevertheless, the court suppressed the evidence seized from Mrs. Santana based upon what it characterized as ". . . the restricted requirements having to do with warrantless entrance into residences . . ." (Petition for Certiorari of the United States Appendix A, at p. 5.) The lower court evidenced a realistic understanding of the problems faced by police officers on the street, yet it felt constrained to rule against the admissibility of the evidence. This is precisely the state of confusion which exists in the area of exigent circumstances today, an area of confusion which this Court can and should resolve, and which it can and should resolve based upon the rule of reason and common sense principles which we have discussed herein.

CONCLUSION.

In the circumstances of the instant case, this Court should find that exigent circumstances existed which justified the warrantless arrest and search of Respondent, Mrs. Santana. Further, this Court should clarify the law of exigent circumstances for the guidance of law enforcement in future cases. We respectfully suggest that such a definition should be based upon the subjective determination of police officers, on the scene, that an exigency did in fact exist due to the threat of destruction

or disposal of evidence and/or contraband. However, as in *Terry* v. *Ohio*, 392 U. S. 1 (1968), there should be an objective determination by the trial court that the subjective determination made by the officers was in fact reasonable.

We urge this Court so to hold and to reverse the decision of the trial court and the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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